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THE

LEGAL STATUS OF THE INDIAN.

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THE

LEGAL STATUS OF THE INDIAN.

BY

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LEGAL STATUS

OF

THE INDIAN.

In the following essay, I have endeavored to classify and present in a succinct form the body of law which governs the relations of the Indians. From this investigation, I have omitted the status of the five civilized nations of the Indian Territory. They occupy a distinct position; their relations could not well be brought under the classification of those of their more savage brethren, and require a separate discussion. I have also omitted all examination of the status of those Indians that have dissolved the tribal bond which united them with their kinsmen. These men are upon the same footing as white inhabitants of the United States; they are subject to the same laws, and possess the same legal privileges. Those that live within commonwealth limits are, as a general thing, admitted to commonwealth citizenship. But the general naturalization laws of the United States do not apply to Indians; a special law is necessary in each case for the admission of one of them to national citizenship.

I have divided this essay into two parts: in the first I examine the relation of the Indian tribes to the sovereign power of this nation; in the second, their relation to the government, both national and commonwealth. Subdivisions of these principal parts are commented on and explained as they occur in the course of the thesis.

The great cases that govern the relation of the Indian tribes to the sovereign are Worcester *v.* Georgia and The Cherokee Nation *v.* The State of Georgia. The great cases that regulate their relation to the government are United States *v.* Kagama.

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The Kansas Indians, and the New York Indians. Mr. Justice Miller, from the fact of his assignment to the Eighth District, which embraces the commonwealths and territories in which most of the cases to which Indians are parties arise, has, in my opinion, contributed more than any other man to the scientific development of the law of the Indians. I believe that his opinion in United States *v.* Kagama is fully as important as either of Chief Justice Marshall's famous decisions in the memorable struggle between the Creeks and Cherokees and the Commonwealth of Georgia.

It is the custom and the fashion to decry the treatment which the aborigines have received at the hands of the American people and of the government of the United States. There is cause for this outcry, and we may congratulate ourselves on the fact that the public mind has been awakened to the condition of the Indians. Wherever the white and the red race have come into contact, the fierce struggle that always marks the meeting of a superior and an inferior race, of a higher with a lower civilization, has manifested itself. But their warlike qualities and their poverty have kept our annals unstained with the blots that Cortes and Pizarro brought upon those of Spain, and in a much less degree, Clive and Warren Hastings upon those of Great Britain. Still there are many passages in the history of our relation to the Indians that every patriot and every lover of mankind would gladly erase. I think I am actuated only by a regard for historical truth when I say that the Indians have been most humanely treated during those periods when the strength of the central government had not yet been undermined by the states-rights doctrine, and after it had recovered from the pernicious effects of the latter. And conversely, when the commonwealths were strong enough to defy the nation, as Georgia did, the Indians suffered most. The reason is not far to seek; it is supplied by one of the first principles of political science. No body of men not a nation can develop a system of public law. Some of the commonwealths of the United States tried to elaborate an Indian system, but they never advanced further than the expedient of subjecting the Indians to a body of laws made to govern the relations of

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civilized white men. A commonwealth in dealing with such a problem is necessarily governed by the immediate interests of its inhabitants; but a nation has a great variety of interests; it has ultimate as well as immediate aims; and its policy is dictated by that broad humanity which is statesmanship. The Civil War that saved the nation from the shame and misery of particularism, restored to the government the control of Indian affairs.

For the reasons already given, I think that the federal government is the only one in the United States which is fitted to solve the Indian question. I think that it has administered its trust with wisdom and benevolence. It has gone far in the solution of the problem. The Indians are carefully protected from the debasing influences of luxuries that mark a civilization far in advance of their own. Ample sums of money, the proceeds of the sale to the general government of their right of occupancy of the vast tracts over which they hunted, have been devoted to the purpose of conducting them gradually through the several stages of culture that separate them from ourselves. Their rights are scrupulously protected by the courts, and, in the last resort, by the army. A great though silent change in public sentiment was marked by the transfer of the administration of their affairs from the War Department to that of the Interior. The military force of the United States is no longer considered the chief agent in the civilization of the wards of the nation. This policy has borne good fruit. The advances made by the nations of the Indian Territory are remarkable. The members of the smaller tribes are dissolving the tribal bond, and are being gradually incorporated in the population of the commonwealth or territory in which they reside. It seems that the date is not far distant when the Indian Territory will be organized under a territorial government. According to the latest reports, the percentage of tribal Indians that live by the product of their labor in civilized pursuits is sixty-eight, the percentage of those who live by hunting and fishing is nine, and twenty-three per cent. live from the bounty of the general government. The number of tribal Indians is diminishing very rapidly, although the births among

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them exceed the deaths by about four hundred-and-fifty a year. I think that within the next fifty years the Indian problem will have solved itself by the extinction of all the tribes and the absorbtion of their members into the white population of the republic.

In studying the legal status of the Indian, the first subject that presents itself for examination, is the relation of the tribes to the sovereign of the United States. To make this examination thorough, it will be necessary to prefix to the discussion proper a short historical sketch.

I. *Relation of the Indians to the Sovereignty of the United States.*

§ 1.—Relation to the Crown of Great Britain.

The first Europeans who landed in America, found the inhabitants in the hunting and fishing stage of civilization, divided into a great many tribes. Within the tribe the bond of union was blood or adoption. Great federations existed, to one or other of which most tribes belonged. The fixed policy of the nations that settled North America, was to regard the Indian tribes as distinct independent political communities. But the European potentates "assumed the ultimate ownership of the soil and the power to make grants of it, subject only to a right of occupancy in the aboriginal inhabitants" ( ). The *dominium utile* was obtained by the settlers, either by purchase or by conquest. Later on, when the Atlantic seaboard was subject to the King of Great Britain, the tribes dwelling within limits claimed by the colonies, were regarded as foreign nations. Diplomatic intercourse existed with them, and they were almost all allies of the King (2). One article of the treaty of alliance usually put the lands occupied by the tribe, under the protection of the King (3); the colonies exercised no jurisdiction over the Indian tribes.

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(1) Fletcher v. Peck, 6 Cranch 87, 142.

(2) N. Y. Colonial Documents VI.; 541, Col. Johnson to Gov. Clinton, 22 Nov., 1749.

(3) VII. Ibid., 16. Wraxall: Some Thoughts on the British Indian Interest in N. A., 1756.

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The effect of the French and Indian War, was to reorganize the department for diplomatic intercourse with the Indians upon a wider basis. A Superintendent of Indian Affairs was appointed for the northern colonies, and one for the southern. Their functions were to make treaties between the tribes and the Crown, and see to the execution of their provisions; to reconcile warring tribes of the King's allies; to prosecute all trespasses by whites upon Indian territory; and to receive all lands which the tribes might sell or surrender. The King was the ultimate lord of the soil, and all sales or surrenders of land by the tribes were technically only surrenders of the right of occupation—cessions of the *dominium utile* to the holder of the *dominium nudum* (1). In 1768, Lord Hillsborough forwarded instructions to the Colonial Governors to have bills passed by the legislatures which should (1), regulate trade with the Indians, punish fraud upon them, forbid encroachment upon the land occupied by them under penalty, and (2), define the status of the Indian in the Colonial Court (2). Massachusetts (3), Pennsylvania (4), Virginia (5), New Jersey (6), and Maryland (7), complied in part at least, with Lord Hillsborough's first demand; only Pennsylvania and Georgia (8) complied with the second; and although their legislation was good, their administration was poor. It is noteworthy that the colonies that owed their existence to the philanthropy of Penn and Oglethorpe were most humane in their treatment of the Indians.

Thus it is evident that at the moment the Revolutionary War broke out, the Indian tribes and confederacies were

(1) VIII. N. Y. Col. Docs., 19.

(2) VIII. Ibid, 55, Hillsborough to the American Governors, 15 April, 1768.

(3) IV. Acts and Resolves of the Province of Massachusetts Bay, 1032; Province Laws 1768, Cap. 18; V. Ibid., 28, 113, 173, 238, 258.

(4) I. Carey and Boerum Laws of Pennsylvania 451, Cap. DLXX. Recorded A, Vol. V., p. 222; Ibid., 451, Cap. DLXXII., Recorded A, Vol. V., p. 227; Ibid., 465 Cap. DLXXXVII., Recorded A, Vol. V., p. 322.

(5) VIII. Hening Stat. at L., 114, 5 Geo. III. Cap. XXI.; VIII., Ib. 433, 10 Geo. III. c. LXVI.; VIII. Ib., 558, 12 Geo. III. c. XXXVIII.; VIII., Ib., 661, 13 Geo. III. c. X.

(6) Allinson's Acts of the General Assembly of N. J., 222.

(7) I. Kilty Laws of Md., c. VIII., 18 Fredk. L. Baltimore.

(8) Marbury & Crawford Digest of the Laws of Georgia (Edit. of 1802), 258.

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regarded as sovereign nations, allies of the King of Great Britain. The acts of the Superintendents of Indian Affairs were generally diplomatic in their nature, and where they were administrative were directed against the King's white subjects. The acts of the colonial legislatures were of the same character; their laws limited the sphere of activity of the whites, not of the Indians.

§ 2.—Relation under the Articles of Confederation.

The Continental Congress and the Congresses of the Confederation, inherited the relation of the King to the Indians. One of the earliest acts of the former (July 12, 1775), was to organize an Indian Department with like powers and duties to that of the King (1). As the war progressed, the particularistic spirit manifested itself in the field of Indian affairs as elsewhere, and soon both the central governments and the government of the commonwealths were exercising the power of the King (2). New York had been the first to seize the administration of Indian affairs as it slipped from the hands of the royal officials; the presence of the powerful Six Nations probably impelled her to this action. The Provincial Congress and the local committees acting under its direction, performed a valuable service for the nation in keeping the Six Nations neutral during the early part of the war (3). In her first constitution (1777)—the first Commonwealth Constitution in the United States—New York extended her jurisdiction over the Indians dwelling within her limits.

When the time came for a division of the powers exercised by the sovereign people between the Central and the Commonwealth governments, the Indian question came up among others for settlement. The Articles of Confederation provide (art. ix.) that the United States shall have the sole and exclusive right and power of determining on war and peace, except (art. vi.) that when a State is threatened with Indian hostilities and can-

(1) I. Journal of Congress, 112 to 117.

(2) I. Journal of the N. Y. Provincial Congress, pp. 802, 1034, 1054; I. Journal of Congress, pp. 240, 250; II., Ibid. 465, 468, 469; III. Ibid., 403.

(3) I. Journal of N. Y. Provincial Congress, pp. 23, 24, 30, 169, 802.

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not communicate with Congress, it may levy war on the Indians; and furthermore (art. ix.) that the United States shall make treaties of peace and alliance with the Indians, and alone shall "regulate the trade, and manage all affairs with the Indians not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated." But the central government was crippled, and the commonwealths assumed and exercised many of its powers. Thus in 1784, the legislature of New York ordered the governor and commissioners to treat with the Indians residing within the State (1). In 1782, Georgia obtained by treaty with the Cherokees all their lands south of the Savannah and east of the Chattahoochee, and from the Creeks, the lands east of the Altamaha and Oconee rivers (2). North Carolina had extended her jurisdiction over the Cherokees dwelling within her limits, and had assigned their land (3). Thus during the period which opened with the war of the Revolution, and closed with the adoption of the Constitution of 1789, the sovereignty of the Indians had gone through an important and clearly marked change. The central government still regarded the tribes as independent sovereign nations (4); but the commonwealth governments, with whom the power of the sovereign people resided, had already ceased to regard them as distinct political communities, as the constitution of New York of 1777, and the law of North Carolina of 1787 clearly show.

§ 3.—The Indians and the Constitution of 1787.

When the sovereign powers of the nation again emerged from the political melting pot, there was a new distribution. The Indians are referred to three times in article i., once in article ii. and once in article iv. of the Constitution. Article i., section ii., paragraph 2, provides that Indians not subject to the jurisdiction of commonwealth governments shall not be

(1) Session Laws of New York, 7 Session, Cap. 22.
(2) III. Hildreth, U. S., 1st Series, p. 425.
(3) 11 Journal of Congress, 121; Worcester v. Ga., 6 Peters, 571.
(4) 7 Journal of Congress, 378.

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represented in Congress, nor be subject to direct taxation. Article i., section viii., paragraph 3, reads: "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes" (1). Article i., section x., paragraph 3, provides that "No State shall enter into any agreement or compact with another State, or with a foreign power, or engage in war unless actually invaded, or in such imminent danger as will not admit of delays." Article ii., section ii., paragraph 2, gives the President power to make treaties; and article iv., section iii., paragraph 2, gives Congress "power to dispose of and make all needful rules and regulations respecting the territory belonging to the United States."

A comparison of the Constitution with the Articles of Confederation show that so far as the Indians are concerned, article i., section x., paragraph 3, of the former corresponds with article vi. of the latter. The treaty making power vested in the President by article ii., section ii., paragraph 2, is vested in Congress by article ix. of the Articles of Confederation. As regards the power to regulate trade, the same article ix. corresponds with article i., section viii., paragraph 3, of the Constitution. The power of the Congress of the Confederation to "manage all affairs with the Indians, provided that the legislative rights of any State within its own limits be not infringed or violated," is not inherited by the Federal Congress. But this was in reality no loss. The paragraph was so vague, as Madison informs us in No. 42 of the Federalist, that it meant nothing; and it is for this reason that it was omitted from the constitution of 1787 (2). Since the drafting of the Articles of Confederation in 1778, the United States had acquired territory, and it became necessary, consequently, to vest the government with the power of making rules and regulations for its government. This power is granted in the constitution of 1787, and its importance in determining the legal status of the Indian can scarcely be over estimated. This fact will appear in the

(1) The history of the phrase, "and with the Indian tribes," may be traced through V. Elliott's Debates, 439, 462, 507, 560.

(2) Cherokees v. Ga., 5 Peters 1, opinion of Thompson, *J.*, dissenting.

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discussion of the relation of the Indian tribes to the government of the United States. In comparing the government under the Articles of Confederation and under the Constitution, the important gain of executive power and organs must not be overlooked.

§ 4.—Relations under the Constitution of 1787.

The theory of the relation of the Indian tribes to the sovereign power in the United States was thus the same after 1789 as before it (1). And the relation in practice was merely the development of the previous relation. Unforeseen causes were at work which were destined to prove the unreality and emptiness of this theory of the Constitution, as of others. The proximity of an inferior to a superior race can only end in the subjugation or extermination of the former. An irresistible wave drove the Indians westward. Washington's second term had scarcely begun when it became manifest that the people in Georgia in their expansion would drive the Creeks from their ancient hunting grounds (2). Although the President expressed to Gov. Telfair of that State his disapproval of the proposed invasion of the Creek territory by the Georgian forces, on the ground of its unconstitutionality, and as disturbing the foreign relations of the United States with Spain and with the Cherokees, Telfair executed his plan, burned an Indian village (Little Oakfuskee, on the Chattahoochee), and informed the agent of the general government of "the conditions that would be required on the part of the State of Georgia, on the establishment of peace between the United States and the Creek Indians." Among them were the representation of Georgia by commissioners at the negotiation of the treaty, the surrender of ten hostages from the Creeks to be placed in the hands of the executive of the commonwealth, and the surrender of objects of retaliation for murders perpetrated by the Indians within the limits of the commonwealth.

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(1) See also American State Papers I., Indian Affairs, 403.

(2) Ibid., p. 362 et seq., Report of Sec'y Knox, communicated to the Senate Dec. 16, 1793, 3d Congress, 1st Session.

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This was not an isolated case. On the 28th December, 1794, and the 7th January, 1795, the legislature of Georgia declared that State to be "in full possession and in full exercise of the jurisdiction and territorial right and the fee simple" of all the lands within its limits, including the Indian lands (1). These examples have been drawn from the State of Georgia because there the evolution of the new relations was proceeding most rapidly, and there these new relations first forced the constitutional theory to recognize them.

§ 5.—Georgia and the Creeks and Cherokees.

This change was accomplished in 1831 and 1832 by the judge-made law enunciated in the opinions of the Supreme Court in the famous cases of the Cherokee Nation *v.* Georgia (2) and Worcester *v.* Georgia (3). The facts in the cases are briefly as follows: In the second decade of this century, Georgia determined to realize her claim to the jurisdiction over the Cherokee territory within her limits. The United States had recognized their independence by treaties dating from 1785, and in 1802 had regulated intercourse with the Indians. December 12th, 1829, the legislature of Georgia annexed the Cherokee territory within the limits of that State, to the counties of Carroll, DeKalb, Gwinnett and Habersham, extended the State laws over the same, annulled all laws and ordinances made by the Cherokees, and placed them and their descendants under various legal disabilities. December 22d, 1830, a second law was passed to regulate intercourse with the Cherokees and for various other purposes. In the Cherokee Nation *v.* The State of Georgia, the plaintiffs sought to restrain the defendant by injunction from executing these laws, after having vainly petitioned the President to protect them against these encroachments. The opinion of the Court was: The Cherokees are a State. They have been recognized as such by the United States in numerous treaties which hold them capable of

(1) American State Papers: I. Indian Affairs, 551; also House Journal, 3d Congress 2d Session, 17th February, 1795.

(2) 5 Peters, 1.

(3) 6 Peters, 515.

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maintaining the relations of peace and war, which hold them responsible in their political character for any violation of their engagements and for aggressions committed upon citizens of the United States. Acts of the United States Government recognize this status, and the courts are bound by these acts. But they are not a foreign nation. They are a domestic, dependent nation, relying on our government for protection and support. So far as their political or commercial relations with foreign nations are concerned, the Cherokees are considered to be within the jurisdictional limits of the United States. Worcester *v.* Georgia, decided practically the same, and declared the statutes of 1829 and 1830 unconstitutional. But the decision of the court was never carried out. As the Indian tribes are not foreign nations in the sense of the Constitution, the ægis of the federal courts no longer covers them.

This is practically the last word on the sovereignty of the Indian tribes. In 1855, it is true, Judge McLean declared that the Cherokee nation is a domestic territory, originated under our constitution and laws, and so far as its laws are concerned, it occupies the same relation to the United States as an organized territory (1). But this ruling has been departed from in *ex parte* Morgan (1884) (2), and no appeal has been taken.

§ 6.—Relation Since 1832.

The XIV. Amendment, which made so great a change in the holders of the sovereignty in this nation, made none in the status of the Indians. In December, 1870, Senator M. H. Carpenter, reported from the committee on the judiciary, "that in the opinion of your committee the fourteenth amendment to the Constitution has no effect whatever upon the status of the Indian tribes within the limits of the United States, and does not annul the treaties previously made between them and the United States." The decision in U. S. *v.* Osborne (3) has stamped this opinion as correct.

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(1) Mackey *v.* Coxe, 18 How., 100.
(2) 20 Fed. Rep., 298.
(3) 6 Sawyer, 406.

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Nor does Section 2079 of the Revised Statutes modify the status of the Indian tribes (1). "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation . . . with whom the United States may contract by treaty; but no obligation or any treaty lawfully made and ratified with any such Indian tribe or nation shall be hereby invalidated or impaired." This is an interpretation of article ii., section ii., paragraph 2 of the Constitution by the proper organ. When the Constitution was adopted treaties might properly be made with the Indian nations by the executive, for their independent existence was as real as against the United States as that of Holland or Prussia. But now, when they are mere "wards," without the protection of international law, or of the federal judiciary, dependent for their political existence upon the clemency of this nation, the making of treaties with them is a farce. Congress has taken care that this interpretation shall not be retroactive. That this statute does not dissolve the tribal relation is proved by this very fact, for where would be the sense of preserving the treaties with the Indian tribes unimpaired, if the tribes themselves were destroyed?

To recapitulate the position of the tribes: They are domestic dependent nations, which have surrendered for the most part jurisdiction over their own members, and occupy their lands, do not own the fee. By the judge-made law of the land, the jurisdiction of the United States in many particulars has been extended over them, although their members can only become citizens by a special enactment of Congress. The Indian nations have no standing in federal courts as foreign States.

II. *Relation of the Indian to the Government.*

The government in the United States is twofold, national and commonwealth, each with organs and functions of its own. The supreme law of the land seems at the first glance to cut off the commonwealth governments from all participation in Indian affairs, but it has been shown that this is only apparent. Thus

(1) Act of March 3, 1871, Cap. 120; 16 Stat., 566.

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the relation of the Indians to the government would naturally be considered under two heads—their relation to the national government and their relation to the commonwealth governments. But this method of treatment would involve great repetition; it has therefore been thought better to discuss the relation of the Indian to the commonwealth government at the same time that his relation to the national legislature and judiciary is examined.

§ 7.—The Executive Department (1).

The President "shall have power, by and with the advice and consent of the Senate to make treaties." From the first this clause was considered to confer the power to carry on diplomatic intercourse with the Indian tribes. It was the ancient inheritance of the executive, coming down to the President from the King of Great Britain. This power afforded at first the only means of carrying on intercourse at all with the Indian tribes; and later it furnished the means of sheltering them in their weakness from the advances of the progressive democratic commonwealths (2). But nothing could prevent the smaller tribes from dissolving, or the larger ones from making war on the citizens of the Union, either because of misconception of the provisions of treaties, or of the nonobservance thereof. In 1867 Congress empowered the President to send a mixed commission of civilians and military officers to the Indian country, whose chief duty was to examine into the causes of discontent of the tribes then on the warpath, and to remove them by treaties negotiated under the direction of the President, and subject to the approval of the Senate (3). In 1870 the House of Representatives tired of making appropriations to fulfill treaty obligations imposed by this hybrid, unpaid, almost irresponsible commission. The sub-committee that prepared the Indian Department appropriation bill in the

(1) Constitution, Art. II., Sec. II., ¶ 2; Art. I., Sec. VIII., ¶ 18.

(2) E. g., the facts in the U. S. v. 43 Gall. of Whiskey; 93 U. S. 188, 19 Int. Rev. Rec. 158.

(3) Congressional Globe, 1st Session, 40 Congress, Appendix pp. 44 and 45; Cap. XXXII. July 20, 1867.

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third session of the Forty-first Congress added to the bill the proviso: "That nothing in this act contained shall be construed to ratify any of the so-called treaties entered into with any tribe, band, or party of Indians, since the 20th of July, 1867" (1). The Senate struck out this clause. A conference committee was appointed which reported the provision that now figures as Section 2079 of the Revised Statutes. This section, already discussed, deprives the President and Senate of the power of making treaties with the Indians, but acknowledges the obligation of treaties already made and ratified (2). It was attacked (3) as repugnant to the Constitution, and its opponents consoled themselves with the thought that "when the party now in power is dispossessed, the principles of the Constitution may be dug up again and restored to their former supremacy." The hated clause still remains on the statute book.

The effect of this law upon the Indian tribes has been to deprive them of another defense. Those tribes that dwell upon reservations within commonwealth limits were protected against the aggression of the governments and citizens thereof by the treaty-making power of the President and Senate, and by the power of Congress to regulate trade. Of the two the former protection was in some cases the more valuable, inasmuch as it was the more flexible and more easily adaptable to the ever varying conditions of the Indians.

§ 8.—Interpretation of Treaties.

Inasmuch as the existing treaties play a very important part in regulating the relation between the Indian tribes and individual Indians on the one hand and the government on the other, it is proper to say a few words about the rules of interpretation of treaties that have been laid down by the courts. Treaties with Indian tribes are treaties within the meaning of the Federal Constitution, and as such are the supreme law of

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(1) Ibid., 3d Session, 41 Congress, p. 763.

(2) Ibid., p. 1821.

3) B Senators Davis of Kentucky and Saulsbury of Delaware; Congressional Globe, 3d Session, 41 Congress, p. 1823.

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the land (1). Although a treaty is the supreme law of the land, yet under the Constitution, Congress may abrogate it so far as it is municipal law, provided its subject matter is within the legislative power of Congress (2). [I cannot agree with Judge McCrary that a treaty can be abrogated only by an enactment in express terms, or by language importing a clear purpose to effect that end (3). I believe that a treaty may be abrogated by the subsequent enactment of a law whose provisions are irreconcileable with those of the treaty (4). I shall discuss this question at greater length further on.] The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense (5). There can be no doubt about the power of the government by treaty to protect the persons and property of foreigners, and remove them from the operation of a particular law of a commonwealth passed for the special purpose of reaching them. So in the case of tribes of Indians, their persons and property can be protected by treaty stipulation, although within the limits of a commonwealth, any law of the commonwealth to the contrary notwithstanding. To make such stipulation is within the power of the government under the Constitution, for upon Congress is conferred the regulation of commerce with foreign nations and with the Indian tribes, and the general treaty-making power could properly contract with reference to these subjects (6). Treaties with an Indian tribe are binding both upon the United States and upon the tribe (5); but the dissolution of the tribal relation necessarily works an abrogation of the treaty.

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(1) Turner v. The American Baptist Missionary Union; 5 McLean, 344.

(2) U. S. v. Tobacco Factory, 1 Dill., 264; 13 Int. Rev. Rec., 91.

(3) U. S. v. Berry; 2 McCrary, 58.

(4) See Mr. Justice Miller's opinion in U. S. v. Ward, 1 Woolw., 17; U. S. v. Stahl; Ibid., 192.

(5) Worcester v. Georgia, 6 Peters, 515; per McLean, J.

(6) U. S. v. 43 Gallons of Whiskey, 19 Int. Rev. Rec., 158; U. S. v. 43 Gallons of Whiskey, 93 U. S., 199; U. S. v. Martin, 14 Fed. Rep., 821.

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§ 9.—Legislation.

In this as in every other branch of the administrative law of the United States, the law is equally with the Constitution a source of the powers and duties of the President. Congress has made no sparing use of its power to impose duties on the President by law. The principal legal provisions regulating the relations of the President to the Indians are:

Revised Statutes 2114 (1). The President is authorized to exercise general superintendence and care over any tribe or nation of Indians which has been removed upon an exchange of territory under authority of the act of May 28, 1830; "to provide for an exchange of lands with the Indians inhabiting any of the states or territories, and for their removal west of the Mississippi; and to cause such tribe or nation to be protected at their new residence, against all interruption or disturbance from any tribe or nation of Indians, or from any other person or persons whatever."

Revised Statutes 2132 (2). The President is authorized in his discretion to suspend all trade with any Indian tribe and to direct the revocation of all licenses and the rejection of all applications therefor.

Revised Statutes 2118, 2147, 2150, 2151 (3). The President is authorized to take such measures and employ such military force as he may judge necessary to remove settlers on or surveyors of lands belonging, secured, or granted by treaty with the United States to any Indian tribe. The President is authorized to employ the military in the removal of persons found in the Indian country contrary to law. He is authorized to use the military in the following instances also, viz.: in the examination and seizure of stores, packages and boats, in which a superintendent of Indian affairs, Indian agent or subagent, or the commanding officer of a military post has reason to suspect that any white person is about to introduce or has

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(1) Act of 28 May, 1830, Cap. 148, §§ 7, 8, v. 4, p. 412.

(2) Act of 30 June, 1834, Cap. 161, § 3, v. 4, p. 729.

(3) R. S. 2118, Ibid. § 11, v. 4, p. 730; R. S. 2147, Ibid. § 10; R. S. 2150, Ibid., §§ 21, 23, v. 4, p. 732; R. S. 2150, Ibid., § 19.

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introduced spirituous liquors into the Indian country (1); in breaking up a distillery of ardent spirits set up or continued in the Indian country, in violation of the provisions of Revised Statutes 2141; in preventing the introduction of persons or property into the Indian country contrary to law; in apprehending Indians accused of committing crimes, offenses, or misdemeanors in any commonwealth or territory, who have fled into the Indian country; in preventing or terminating hostilities between Indian tribes. An officer of the army making an arrest under the above provisions acts as an officer of the civil law. To justify such arrest it must appear upon oath that there is probable cause, as is provided in the fourth amendment to the Constitution. No person so arrested can be detained by the military authorities more than five days before handing him over to the civil authorities for trial (2).

Since 1832 the duty of supervising the affairs of the Indians has devolved upon the Commissioner of Indian Affairs. In 1849, that officer was transferred to the Department of the Interior. It is needless to say that the President has by law (3) the ordinance power necessary to carry into effect the provisions of all laws relating to Indian affairs.

THE LEGISLATIVE DEPARTMENT (4).

The relation of the Indian to the legislative department of the government of the United States rests upon two grants of power to Congress, *viz.:* to dispose and make all needful rules and regulations respecting the territory of the United States; and to regulate commerce with the Indian tribes.

§ 10.—Power of Congress over Indians in the Territories.

It would seem at first a moot question, whether the Indian country can properly be included within the territory of the United States. It is improbable that the founders of the government

(1) See R. S. 2140.
(2) *Re* Carr, 3 Sawyer, 316.
(3) Revised Statutes, § 465.
(4) Constitution Art. IV., Sec. III., ¶ 2: Art. I., Sec. VIII. ¶ 3

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so regarded it, for, as has been already pointed out, the Indian tribes in 1789 were many of them in a state of complete independence. This view is upheld by the fact that the grant of power over the Territories reads: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." The "territory and other property belonging to the United States," would appear to mean the "places purchased, by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings," referred to in article 1, section viii., paragraph 17; the public lands of the United States, and the aforesaid forts, magazines, and public buildings, and ships and arms and munitions of war. But there is other territory belonging to the United States; and also territory which, although not technically belonging to the United States, has been and is still governed by rules made by Congress. Of the first, the public lands are an example; of the second, all the so-called territories of the United States. American jurists have never been certain that the power to govern the last named is one of the enumerated powers of Congress. The weight of opinion inclines the other way; and it has been maintained by one school of politicians, whose opinion was upheld by an important decision of the Supreme Court, that the Congress has no power of government at all over territory acquired since the adoption of the present constitution. Chief Justice Marshall, in The American Insurance Company *et al.* v. Canter (1), declared that a territory is governedby that clause in the constitution which empowers Congress "to make all needful rules and regulations, respecting the territory, or other property belonging to the United States."

"Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United

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() I Peters, 542, 543.

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States. The right to govern, may be the inevitable consequence of the right to acquire territory." Story says (1): "As the general government possesses the right to acquire territory, either by conquest or by treaty, it would seem to follow, as an inevitable consequence, that it possesses the power to govern what it has so acquired." "There is nowhere an express power given to Congress to erect them [territorial governments]. But, under the confederation, Congress did provide for their erection as a resulting and implied right of sovereignty, by the celebrated ordinance of 1787; and Congress under the constitution, have ever since, without question, and with the universal approbation of the nation, from time to time created territorial governments. Yet Congress derive this power only by implication or as necessary and proper to carry into effect the express power to regulate the territory of the United States" (2). Chief Justice Waite, in The National Bank v. Yankton County (3), is of the following opinion: "There have been some differences of opinion as to the particular clause in the Constitution from which the power of Congress to govern the territories is derived; but that such power exists, has always been conceded. All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress." Chief Justice Taney's opinion in Dred Scott v. Sanford is most decided: "The provision of the Constitution authorizing Congress to make all needful rules and regulations for the government of the territory and other property of the United States does not apply to territory acquired by the present Federal government by treaty or conquest from a foreign nation. These clauses have no connection with the general powers and rights of sovereignty delegated to the new government, and can neither enlarge or diminish them. They were inserted to meet a present emergency, and not to regulate its powers as a government" (4). "Consequently the power which Congress may have lawfully exercised

(1) Story Commentaries, § 1324.
(2) Ibid., § 1265.
(3) 101 U. S., 129, October, 1879.
(4) Dred Scott v. Sanford, 19 Howard, 393.

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in this territory, while it remained under a territorial government, and which may have been sanctioned by judicial decision, can furnish no justification and no argument to support a similar exercise of power over territory afterwards acquired by the federal government" (1). "The power to expand the territory of the United States by the admission of new States is plainly given ; and in the construction of this power by all the department of the government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission". "But until that time arrives, it is undoubtedly necessary that some government should be established, in order to organize society and protect the inhabitants in their persons and property; and as the people of the United States could act in this matter only through the government which represented them, and through which they spoke and acted when the territory was obtained, it was not only within the scope of its powers, but it was its duty to pass such laws and establish such a government as would enable those by whose authority they acted to reap the advantages they anticipated from its acquisition and to gather there a population which would enable it to assume the position to which it was destined among the States of the Union" (2).

The distinction drawn by Judge Taney between the territory acquired by the Confederate and Federal governments, is undoubtedly a correct and useful one. The territory acquired by the former was "property" in the true sense of the word; and the words "rules and regulations" are used in the Constitution to indicate the means for the management of property, and not for the exercise of governmental jurisdiction, as the learned judge points out. The Virginia Act of Cession of 1783 authorizes the delegates of that State to "convey, transfer, assign, and make over to the United States, all right, title, and claim, as well of soil as jurisdiction, which this commonwealth hath to the territory or tract of country, within the limits of the Virginia charter, situate, lying, and being to the northwest of

(1) Dred Scott v. Sanford, 19 Howard, 442.
(2) Ibid., p. 447, 448.

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the river Ohio." And the title of Virginia to the soil of the Northwestern Territory was the title to all of it, with the exception of that inhabited by "the French and Canadian inhabitants and other settlers of Kaskasies and Saint Vincent and the neighboring villages." In the territory acquired by the present federal government, on the other hand, the United States has obtained property in the public lands and buildings only. This statement does not apply to the cessions made by North Carolina and Georgia. This is the rule of international law; and its observance is stipulated expressly in the Louisiana Cession Treaty (Paris, 30th April, 1803) (1), Art. II.

§ 11.—Alleged Limitations of this Power.

Some little time and space have been devoted to the above discussion, because on the answer to the question: "Whence does Congress derive its power to govern the territories?" depends in great measure the weightier question: "Is this power limited or absolute?" Taney's answer no longer requires serious consideration; so fine spun a hair of logic cannot hold suspended so weighty a power as that of Congress to govern the territories. Moreover, it was written to meet a political necessity; the necessity of opening the territories to the slave power. Kent (2) and Story (3) agree that the power of Congress over the territories is absolute, except so far as limited by the Ordinance of 1787, or by stipulations in the cessions. The Missouri Compromise proceeded on the assumption that Congress has the same power of defining property in the territories that each commonwealth possesses within its own limits. In 1850, Senator Seward, in his famous speech on the subject of "Freedom in the New Territories," said: "Congress has the same legislative sovereignty in the territories as the territories themselves would have, if states (4). In 1838, in United States v. Gratiot, Judge Thompson declared: "The term territory is equivalent

(1) VIII. U. S. Stat. at Large, 200.
(2) Kent, Commentaries, 385.
(3) Story, Commentaries, § 1328.
(4) Seward's Works, 51.

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to the word lands. And Congress has the same power over it as over any other property that may belong to the United States; and this power is vested in Congress without limitation" (1). In 1879, in The National Bank v. The County of Yankton, Chief Justice Waite made the contradictory statements: "Subject to the limitations expressly or by implication imposed by the Constitution, Congress has full and complete authority over a territory," and "in other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the States." According to the latter dictum, the power of Congress to exercise local government in the territories is full and complete. The national legislature has evidently taken the same view of the subject; for in 1882 it enacted the "Edmunds' Law," directed against the practice of polygamy in the territories, in which the civil rights guaranteed to citizens of the United States by the Bill of Rights, and as expounded by the judiciary, are in great measure disregarded (2). The constitutionality of this law has twice been confirmed by the Supreme Court (3).

This is the state of affairs at present, and the only defense the Indian has against the unlimited power of the government is the provision of the statute of 1871, already referred to, which provides that no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired (4).

But the Supreme Court may return to the construction of 1856, that the government has no further powers over the citizen's civil rights in the territory than in the state. It may also take the view that all powers intrusted to Congress must be gauged by the ends to accomplish which the Constitution was ordained and established, viz., to form a more perfect union, establish justice, insure domestic tranquillity,

(1) 14 Peters, 537.
(2) 22 Stat. at Large, 30.
(3) Clawson v. U. S., 114 U. S. 477. Cannon v. U. S. 116, U. S. 55.
(4) Rev. Stat., 2079.

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provide for the common defense, and secure the blessings of liberty. Among these ends is not that of forming the ultimate government for domestic dependent nations. Such an end probably did not occur to the minds of the framers or ratifiers of the Constitution, and it can scarcely be deduced from that instrument by any legitimate method of construction. Such a change of construction is by no means improbable; for in Chief Justice Waite's opinion in The National Bank v. The County of Yankton, pronounced in 1879, and cited on page 29 of this essay, he speaks of the authority of Congress over the territories being subject to express or implied limitations in the Constitution.

In case such a change in construction should occur, would the power of Congress over the Indian tribes occupying reservations within the limits of the territories be decreased? Probably not; following the precedent laid down in the Cherokee Nation v. Georgia, the court would refuse to interpret a political point, and Congress would become judge in its own cause.

Thus Congress has complete and unlimited jurisdiction over the Indian tribes dwelling within the territories.

§ 12.—Power of Congress over Indians in the Commonwealths.

The next point is the relation of the national legislature to the tribes that occupy reservations within the limits of commonwealths, members of the United States. Those clauses of the Constitution which empower the President to make treaties and Congress to regulate commerce with the Indian tribes, and the interpretations put upon them, must be looked to primarily for light upon this question. Under these grants of power, tribes have been removed westward into territory that afterwards has been included within the limits of commonwealths. The erection of such territory into commonwealths, has, of course, destroyed the unlimited jurisdiction exercised by Congress over the tribes. The United States, moreover, has found tribes of Indians settled upon the territory that it has acquired by treaty, and the government has assumed certain obligations

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with respect to such Indians; as, for example, in article xi. of the Treaty of Guadaloupe Hidalgo (2 February, 1848) (1). It remains to be seen whether the advance from the territorial to the commonwealth stage of government affects the power of Congress to fulfill such treaty-stipulation.

It is an accepted principle of constitutional interpretation, that where a treaty requires the co-operation of the legislative department of the government for the fulfillment of its conditions, that department may not withhold its co-operation. This duty is not one, however, whose performance can be enforced by the courts. It is also an accepted principle, that the government cannot bind itself by treaty to perform any act that would violate the constitution. Thus the United States government may agree by treaty to perform certain acts towards Indians occupying ceded territory, which acts may be fully within the legal power of the government so long as the territorial status is maintained, but which may be beyond the power of the general government when the territory has been erected into a commonwealth, unless some clause, irrevocable without the consent of the general government, granting to that government the power to fulfill its treaty obligations towards the Indians dwelling within the commonwealth limits, be incorporated in the commonwealth constitution, similar to that which was incorporated in the constitution of Kansas.

§ 13.—The Grant of Power and Its Interpretation.

The grant of the power which Congress exercises over the Indian tribes dwelling within commonwealth limits is contained in article i., section viii., paragraph 3: "The Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The Court has declared that commerce includes intercourse (2). It means traffic and personal intercourse (3). "The power of Congress under the constitution to regulate commerce with the

(1) XIV. Marteus' Nouveau Receuil General de Traites, 20-22.
(2) Gibbons v. Ogden, 9 Wheaton, 189.
(3) U. S. v. Holliday, 3 Wall, 407.

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Indian tribes is in its nature, general, and not confined to any locality. Its existence necessarily implies the right to exercise it whenever there is a subject to act upon, although within the limits of a State, and it extends to the regulation of commerce with individual members of the tribe" (1). "The power to regulate commerce among the Indian tribes is vested exclusively in Congress" (2). Accordingly, an act of the legislature of Georgia, which rendered it a penal offense for any white person to reside within the limits of the Cherokee nation without a license from the governor the commonwealth and an oath of allegiance to the commonwealth, was declared void by the Supreme Court (2). Notwithstanding this ruling in 1832, the Supreme Court, 1858, held valid a statute of the commonwealth of New York, making it unlawful for any persons other than Indians to settle or reside upon any lands belonging to, or occupied by, any nation or tribe of Indians within that commonwealth, and providing for the summary ejectment of such persons (3). Thus the dictum of Worcester v. Georgia, must not be taken *au pied de la lettre*. When the commonwealth endeavors to regulate intercourse with the Indian tribes to the injury of the latter, or enacts a statute which is in open opposition to a regulation of Congress, or which antagonizes the policy of the government, its action is void. But when the commonwealth endeavors by its action to support and supplement the action or policy of the government, such a commonwealth regulation will be held valid. Thus we may say that the commonwealth has an undefined police power to protect the Indian country from intrusion by white invaders, which will be recognized and upheld by the United States Courts when it is not exercised counter to the regulations or policy of the general government. But no commonwealth can withdraw tribes or individual Indians from the operation of Federal laws enacted under the power to regulate commerce, either by conferring commonwealth citizenship upon them, or by making them electors of

(1) U. S. v. 43 Gallons of Whiskey, 3 Otto, 188; see U. S. v. Bridleman, 7 Sawyer, 243.

(2) Worcester v. Georgia, 6 Peters, 515.

(3) New York v. Dibble, 21 How., 366; Aff'g, 16 N. Y., 203.

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Presidential electors, or by bestowing any other right or privilege upon them (1). "The conferring of rights and protection upon the Indians by the State, of which they avail themselves, does not subject them to the laws of the State, as long as they are protected and their nationality recognized by the federal government" (2). This principle is in nowise invalidated by the fact that several commonwealths have attempted to extend their jurisdiction over tribes and individual Indians by means of commonwealth statutes and judgments in commonwealth courts. Of this nature is Chief Justice Spencer's opinion, "that the sole and exclusive jurisdiction of trying and punishing all and every person of whatever nation or tribe, for crimes and offences committed within any part of this State, of right belongs to, and is exclusively vested in the courts of justice of this State" (3). [Reversed in the Court of Errors and Impeachments by Chancellor Kent (4)]. Murray v. Wooden held that "a deed from an Indian executed and ratified in conformity to the laws of this State, is a valid and operative conveyance, notwithstanding the laws of Congress" to the contrary (5). Of the same nature are People v. Antonio (6), McCracken v. Todd (7), Hicks v. Enhortonah (8), and section i. of pages 304 and 305, Swan's Statutes of Ohio (Edition of 1854).

§ 14.—Powers over Indians Wherever Found.

There are certain powers which may be exercised by Congress with respect to Indians wherever they are to be found. The sending of seditious messages, or carrying them *scienter* to or from any Indian nation, tribe, or chief, with intent to produce a contravention or infraction of any treaty or law of the

(1) U. S. v. Holliday, 3 Wall, 407; U. S. v. Cisna, 1 McLean, 254; U. S. v. Bridleman, 7 Sawyer, 243.

(2) Kansas Indians, 5 Wall, 731, Opinion by Davis, *J.*

(3) Jackson v. Goodell, 20 Johnson, 188.

(4) Goodell v. Jackson, 20 Johnson, 693.

(5) 17 Wendel, 531, Opinion by Nelson, *C. J.*

(6) 27 Cal., 404.

(7) 1 Kan., 148.

(8) 21 Ark., 106, 485.

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United States, or to disturb the peace and tranquillity of the United States, is forbidden under penalty (1). Likewise the correspondence with foreign nations with intent to incite the Indians to war (2). The conditions upon which trading with the Indian tribes will be permitted are laid down in Revised Statutes, 2128: Loyalty, citizenship of the United States, good moral character, the giving of a penal bond, with two good sureties, to be approved by the superintendent of the district in which the trade is to be carried on, or by the United States district judge or district attorney for the district in which the obligor resides. The bond to be renewable each year, on condition that the trader shall have faithfully observed all laws and regulations made for the government of tribes and of intercourse with the Indians (3). The sale of arms or ammunition by a trader or his agent within a district occupied by uncivilized or hostile Indians, contrary to the rules and regulations of the Secretary of the Interior, is forbidden under penalty of forfeiture of the right to trade, and exclusion from the district so occupied (4). The condition under which private contracts may be entered into with any band, tribe, or nation of Indians, or individual Indians, or Indians not civilized; the conditions under which contracts entered into prior to May 21, 1872, may be recognized by the officers of the United States; the conditions governing the assignment of contracts, and the penalty for receiving money under prohibited contract, are very carefully laid down (5). Agents and empolyés of the United States government, or any of the departments thereof, are forbidden to have any interest, direct or indirect, in Indian contracts, under heavy penalties (6). Whenever an uncivilized Indian belonging to a

(1) Rev. Stat., Secs. 2111, 2112, Law of 30th June, 1834, Cap. 164, §§ 13 and 14, v. 4, p. 731.

(2) Rev. Stat., § 2113, Ibid. § 15.

(3) Rev. Stat., § 2128, Law of 26th July, 1866, Cap. 266, § 4, v. 14, p. 280.

(4) Rev. Stat., § 2136, Law of 14th Feb'y, 1873, Cap. 138, § 1, v. 17, p. 459.

(5) Rev. Stat., 2103, 3 Mar., 1871, Cap. 120, § 3, v. 16, p. 570; 21 May, 1872, Cap. 177, §§ 12, v. 17, p. 136; 3 Mar., 1875, Cap. 132, § 9, v. 18, p. 450; 43 Cong., 1 Sess., Cap. 135; April 29, 1874, v. 18, p. 35, Rev. Stat. 2106; 21 May, 1872, Cap. 177, § 2, v. 17, p. 136; 29 April, 1874, v. 18, p. 35, Rev. Stat. 2105; 3 Mar., 1871, Cap. 120, § 3, v. 16, p. 570.

(6) 43 Cong., 1st Session, Cap. 389, Sec. 10, June 22, 1874.

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band or tribe receiving an annuity from the United States, trespasses upon the lands of civilized Indians, the superintendent or agent of the tribe shall estimate the damage, and the sum so ascertained shall be withheld from the next payment either to the band or tribe as the superintendent may deem proper; and the sum withheld shall, with the approval of the Secretary of the Interior, be paid over to the party injured (1). Any Indian born in the United States, who is the head of a family, or who has arrived at the age of 21 years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, be entitled to the benefit of the Homestead Act of May 20, 1862, and the acts amendatory thereof, except that section 8 of said act shall not apply to entries made under this act; *provided*, that the title to lands thus acquired shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for five years from the date of the patent issued therefor; and *provided*, that any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands, and other property, the same as though he had maintained his tribal relations; and any transfer, alienation, or incumbrance of any interest he may hold or claim by reason of his former tribal relations shall be void. It is further provided that in all cases where Indians have entered public lands prior to the enactment of this law, and have complied with the regulations of the Commissioner of the General Land Office, the entries so allowed are confirmed by this law, and that patents shall be issued therefor; subject, however, to the above restrictions and limitations in regard to alienation and incumbrance (2). One of the most important regulations prescribed by Congress is that which forbids under penalty the sale, exchange, gift, barter, or disposal of any spirituous liquor to any Indian under the charge of any Indian superintendent (3). The court

(1) Rev. Stat. 2120, 14 June, 1862, Cap. 101, § 2, v. 12, p. 427.

(2) 43 Cong., 2d Session, Cap. 131, Sections 15 and 16, 3 Mar., 1875.

(3) Rev. Stat., 2139, 9th July, 1832, Cap. 174, § 4, v. 4, p. 564; 15th March, 1862, Cap. 33, v. 13, p. 29; 27th Feb'y, 1877, Cap. 69, Sect. I., § 48, v. 19, p. 244.

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has interpreted and confirmed this regulation in several cases (1). In U. S. v. Holliday, Mr. Justice Miller declared: "The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or the member of the tribe with whom it is carried on." To warrant a conviction under the act of 15th March, 1862 (13 Statutes at large 29), prohibiting the sale of liquor to any Indian under the charge of an Indian agent, it is not necessary that such agent should have actual control or immediate personal superintendence over the Indians to whom liquor has been sold. The fact that the tribe to which he belongs is under the charge of the agent, and that the Indian himself still maintains tribal relations are sufficient to constitute him under the agent's charge (U. S. v. Flynn, 1 Dillon, 451). The facts that an Indian is so far connected with his tribe that he still lives among them, receives his annuity under a treaty with the United States, and is represented in that matter by the chiefs or head men of his tribe, who receive it for him, and that an agent of the government attended to this and other matters for that tribe, show the Indian to be still a member of his tribe, and under the charge of an Indian agent, notwithstanding the circumstances that he had a piece of land on which he lived, voted in county and town elections in a commonwealth (Michigan), and that the constitution and laws of that commonwealth withdraw such Indians from the influence of the law of 15th March, 1862 (U. S. v. Holliday). Under the power to regulate commerce with the Indian tribes, Congress is authorized to prohibit, if necessary, all intercourse with them; or to permit it only under a license (2).

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(1) U. S. v. 43, Gallons of Whiskey, 93 U. S., 188; U. S. v. Earl, 17 Fed. Rep., 75; U. S. v. Shawmux, 2 Sawyer, 364; U. S. v. Holliday, Same v. Haas, 3 Wall, 407; U. S. v. Flynn, Dillon, 451.

(2) U. S. v. Bailey, 1 McLean, 234; U. S. v. Cisna, Ibid. 254; U. S. v. Holliday, 3 Wall, 407.

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§ 15.—Classification of Indians Residing within Commonwealth Limits.

The legal relation to the government of Indian tribes or individuals, residing within commonwealth limits, is a complex one. The simple relation existing in the territory is complicated by the duality of the government (national and local) in the commonwealth. For the purposes of this essay, it will be convenient to classify the Indians dwelling within commonwealth limits, as follows:

A.—Those dwelling upon territory whereof the fee is vested in the general government, and over which that government exercises sole and exclusive jurisdiction.

B.—Those occupying Indian country within the exterior geographical limits of commonwealth.

C.—Those occupying territory subject to the general jurisdiction of the commonwealth, but over whom Congress also has jurisdiction, under the constitutional power to regulate commerce within the Indian tribes, under a treaty, and as wards of the nation (1).

§ 16.—Relation of the Federal government to Indians dwelling upon territory, whereof the fee is vested in the general government, and over which that government exercises sole and exclusive jurisdiction.

This includes places ceded or purchased for the establishment of forts, magazines, arsenals, military schools, etc. Such a purchase or cession is usually accompanied by a formal withdrawal of its jurisdiction by the commonwealth within whose limits such territory lies. "And generally there has been a reservation of the right to serve all State process, civil and criminal, upon persons found therein. This reservation has not been thought at all inconsistent with the provision of the Constitution; for the State process, *quoad hoc*, becomes the process of the United States, and the general power of exclusive legislation remains with Congress. Thus, these places are

(1) U. S. v. McBratney, 104 U. S., 621; *ex parte* Crow Dog, 109 U. S., 556; U. S. v. Kagama, 118 U. S., 375.

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not capable of being made a sanctuary for fugitives to exempt them from acts done within, and cognizable by the State to which the territory belonged; and at the same time Congress is enabled to accomplish the great objects of the power.

Commonwealth v. Clary, 8 Mass., R. 72; U. S. v. Cornell, 2 Mason R. 69; Rawle on Constitution, ch. 27, p. 238; Sergeant on Constitution, ch. 28, [ch. 30]; 1 Kent's Comm., Lecture 19, p. 402 to 404.

But if there has been no cession by the State of the place, although it has been constantly occupied and used, under purchase, or otherwise, by the United States for a fort, arsenal, or other constitutional purpose, the State jurisdiction still remains complete and perfect" (1).

The People v. Godfrey, 17 Johns. R., 225; Commonwealth v. Young, 1 Hall's Journal of Jurisp., 47; 1 Kent's Comm. Lect. 19, pp. 403, 404; Sergeant on Constitution, ch. 28 [ch. 30]; Rawle on Constitution, ch. 27, p. 238 to 240.

An instance of the facts mentioned here, is to be found in the case of the Fort Harker, Kansas, military reservation. The Federal Courts have no jurisdiction of the crime of murder committed there, because the commonwealth legislature has never given its consent to the occupation of such reservation by the United States, as is required by the Constitution in order to vest such jurisdiction in the United States (2).

B.—*Jurisdiction of the government over Indian tribes occupying Indian country within the exterior geographical limits of a commonwealth.*

§ 17.—History of the Term: Indian Country.

The first requisite in the discussion of this topic, is a definition of the term "Indian Country." This term was first used in the Trade and Intercourse Act of July 23, 1790 (1 Stat. at Large, 137), where it was undefined. It was used again without definition in the second trade and intercourse act, enacted March 1, 1793 (1 Stat. at Large, 329). It was first defined in the third intercourse act, 1796 (1 Stat. at Large, 460), to be the country west of an irregular line, extending from the present site of Cleveland, Ohio, to the river St. Mary, Florida (the

(1) Story on the Constitution: Fourth Edition, §§ 1225, 1227.
(2) U. S. v. Stahl, Woolw., 192; McCahon, 206.

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then boundary fixed by various treaties with the several tribes), and this line was subject to variation, as subsequent treaties might change the boundaries between the various tribes and the United States. This act having expired, it was re-enacted with the same definition March 3, 1799 (1 Stat. at Large, 743), and again re-enacted, on its expiration, April 30, 1802 (2 Stat. at Large, 139), (1). "The first section of that act describes a boundary, the description occupying over a page of the statute book, and declares that this shall be distinctly marked under orders of the President, and considered as the line of the Indian territory, or Indian country, as it is called indifferently in several sections of the act. The country west of the Mississippi then belonged to France and Spain. The boundary above mentioned, commencing at the mouth of the Cayahoga River, on Lake Erie, now Cleveland, runs in a wonderfully tortuous course through the country northwest of the Onio river, to the falls of that river, now Louisville, then down that river to a point between the mouths of the Cumberland and Tennessee rivers, and then through Kentucky, Tennessee and Georgia, to the St. Mary's river, pursuing all the way the lines represented by treaties with various Indian tribes" (2). By the act of 1822 (3), the President was authorized to search the packages of traders suspected of carrying ardent spirits into the Indian *countries*.

"Though many statutes concerning intercourse with the Indians and prescribing offenses within the Indian country were passed, no other attempt to define what was Indian country was made by Congress until the act of 1834. . . . In the meantime, we had purchased the country west of the Mississippi, and had organized two States and a Territory there, and most of the Indians with whom we had to deal lived there." (2).

Section 1 of the important act of June 30, 1834 (4), entitled "An Act to regulate trade and intercourse with the Indian

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(1) Error; should read March 30. Note appended to "Forty-three Cases Cognac Brandy," 14 Federal Reporter, 541.

(2) Bates v. Clark, 95 U. S., 204.

(3) 3 Stat. at Large, 682.

(4) 4 Stat. at Large, 729.

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tribes, and to preserve peace on the frontier," defines the Indian country as follows:

"That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any State to which the Indian title has not been extinguished, for the purposes of this act, be taken and be deemed to be the Indian country."

"The country east of the Mississippi, and not within any State, was the region north of Illinois and Indiana, and northwest of Ohio, now constituting the States of Michigan and Wisconsin, and then under the government of the Michigan Territory."

"Notwithstanding the immense changes which have since taken place in the vast region covered by the act of 1834, by the extinguishment of Indian titles, the creation of States and the formation of territorial governments, Congress has not thought it necessary to make any definition of Indian country. Yet during all this time a large body of laws has been in existence, whose operation was confined to the Indian country, whatever that may be. And men have been punished by death, by fine, and by imprisonment, of which the courts who so punished them had no jurisdiction, if the offenses were not committed in the Indian country, as established by law. These facts afford the strongest presumption that the Congress of the United States, and the judges who administered those laws, must have found in the definition of Indian country, in the act of 1834, such an adaptability to the altered circumstances of what was then Indian country as to enable them to ascertain what it was at any time since then" (1). The learned judge then goes on to prove that the section in question must be read with a comma or semicolon inserted after the clause "and not within any State," making the words "to which the Indian title has not been extinguished" apply to "that part of the United States," whether east or west of the Mississippi. He quotes the cases of The American Fur Company *v.* The United States (2), decided in 1829, and United States *v.* Forty-three

(1) Bates *v.* Clark, 95 U. S., 204.
(2) 2 Peters, 358.

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Gallons of Whiskey (1), decided in 1876, in support of this construction, and proves that any other would lead to a *reductio ad absurdum*. Bates *v.* Clark was decided in the Supreme Court, at the October term, 1877.

The Revised Statutes went into effect June 22, 1874; on which date they were approved by the President. Title xxvii. relates to the Indians, and the sub-title of chapter four is "Government of Indian Country." It contains many provisions regulating the subject of intercourse and trade with the Indians in the Indian country, and imposes penalties for their violation. The expression "Indian country" occurs several times, *e. g.*, in sections 2129 (license to trade in the Indian country, act of June 30, 1834, sec. 2), 2130 (ibid.), 2131 (ibid.), 2133 (penalty for trading without a license, ibid., sec. 4), 2134 (penalty upon foreigners entering the Indian country without license, ibid., sec. 6), 2135 (prohibited purchases and sales, ibid., sec. 7), 2137 (penalty for hunting upon Indian lands, ibid., sec. 8), 2141 (penalty for setting up a distillery in the Indian country, ibid., sec. 21), 2145 (general laws as to the punishment of crime extended to the Indian country, ibid., sec. 25), 2147 (removal of persons from the Indian country found there contrary to law, ibid., sec. 10), 2150 (employment of the military in apprehending persons violating the law, ibid., secs. 21, 23), 2151 (detention of persons so apprehended, ibid., sec. 23), 2152 (arrest of absconding Indians guilty of crime, ibid., sec. 19), 2154 (reparation for injured property, ibid., sec. 16), 2156 (injury to property by Indians, ibid., sec. 17), and in other sections, containing provisions of other acts than that of June 30, 1834. Revised Statutes, section 5596, provide: All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in said Revision, are hereby repealed, and the section applicable thereto shall be in lieu thereof; all parts of such acts not contained in said Revision, having been repealed or suspended by subsequent acts, or not being general or permanent in their nature: *Provided*, That the incorpora-

(1) 93 U. S., 188.

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tion into said Revision of any general or permanent provision, taken from an act containing other provisions of a private, local, or temporary character, shall not repeal or in any way affect any provision of a private, local, or temporary character contained in any of said acts, but the same shall remain in force," etc. Section 1 of the act of June 30, 1834, which defined the Indian country, was not inserted in the Revision.

§ 18.—Definition of the Term: Indian Country.

In 1882, there came before the Circuit Court, district of Minnesota, the case of Forty-three Gallons of Cognac Brandy (Palcher and others v. United States) (1), on writ of error from the district court. Proceedings in the lower court were instituted under the provision of section 2140, Revised Statutes, which empowers certain United States officers to search for and seize any spirituous liquors or wines introduced or about to be introduced into the Indian country, and, if any such be found, to seize the same, and all the conveyances used in introducing the same, as well as all the goods, packages, and peltries of such persons so introducing the same; to be proceeded against by libel in the proper court and forfeited, one-half to the informer, and the other half to the United States. The decision of the district court was for the plaintiff. In the circuit court, Judge McCrary, delivering the opinion of the court, declared that the first section of the act of 1834 was repealed by Revised Statutes, section 5596, unless it comes within the proviso, as being in its nature private, local, or temporary. He then declared that neither the entire act, nor the section in question when considered by itself, were within the proviso. "Upon one point, however, I am clear, and that is all that I am called upon to decide. If necessity required the court to determine the meaning of the words the 'Indian country,' in the absence of any statutory definition, I should, in a criminal case, in obedience to the rule which requires that the words in a penal statute should be construed strongly in favor of the accused, hold that the Indian country is that portion of the public

Def of Indian Country

(1) 11 Federal Reporter, 47.

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domain which is set apart as a reservation, or as reservations for the use and occupancy of the Indians, and not the whole vast extent of the national domain to which the Indian title has not been extinguished. In this case it is not claimed that the liquor was seized within the limits of an Indian reservation, and it follows, according to the view I have taken of the statutes, that the seizure was unauthorized." It was ordered that the decree of the district court be reversed.

I believe that the learned Judge erred in this opinion. It is an acknowledged principle of legal hermeneutics that clauses of a statute, that have been repealed, may be considered in the construction of provisions that remain in force (1). The United States Supreme Court confirm this position in Ex Parte Crow Dog (2), decided in December 1883, more than a year after the decision in "United States v. Forty-three Gallons of Cognac Brandy." The opinion was given by Justice Matthews. He quotes the opinion of Justice Miller in Bates v. Clark, already cited, to the effect that, "it follows from this that all the country described by the act of 1834 as Indian country, remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provision by treaty or by act of Congress." He adds: "In our opinion, this definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of the Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a State, not excepted from its jurisdiction by treaty or by statute at the time of its admission into the Union, but saving, even in respect to territory not thus excepted and actually in the exclusive occupancy

(1) On this point see Bramwell, L. J., in Attorney-General v. Lamplough, L. R. 3 Ex. D., 223-227; Hardcastle on Statutory Law, 217; Bank for Savings v. Collector, 3 Wall., 495-513; Commonwealth v. Bailey, 13 Allen, 541.

(2) 109 U. S., 541.

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of the Indians, the authority of Congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it. United States v. McBratney, 104 U. S., 621 " (1).

I believe that Justice Matthews also has committed an oversight in the above admirably lucid definition of the Indian country; and it is essential to the understanding of the topic now under discussion that this oversight should be pointed out and corrected. He first marks out in bold outline the boundaries of the Indian country, and then excludes from it "any territory embraced within the exterior geographical limit of a State, not excepted from its jurisdiction by treaty *or* by statute at the time of its admission into the Union." In my opinion this definition should be amended so that it shall exclude from the Indian country any territory embraced within the exterior geographical limits of a commonwealth, not excepted from its jurisdiction by treaty *and* by statute at the time of its admission into the Union. The absence of a comma between the word "statute" and the limiting clause proves that that clause refers to "statute" alone, and not to treaty also. It will be noticed that the learned justice sets out to define the Indian country now only, not to advance a definition that will apply at all times, and this fact excludes from discussion such interesting questions as whether the government of the United States can except territory within commonwealth limits from the jurisdiction thereof either by statute at the time of the admission of the commonwealth alone, or by treaty contracted after the admission of the commonwealth alone, or by any other means (2). That the general government can do the first,

(1) This decision overrules U. S. v. Leathers, 6 Sawyer, 17; and U. S. v. Bridleman, 7 Sawyer, 243; both of which I shall discuss later.

(2) On the latter very interesting subject see: Bluntschli, Völkerrecht, § 286; 2 Twiss, Law of Nations, § 161; 1 Kent, Commentaries, 162, 166, 167; Vattel, Droit des Gens., liv. 1, ch. 23, § 244, ch. 21, § 262, liv. 4, ch. 2, §§ 11, 12; Grotius, De Jure Belli ac Pacis, lib. 3, cap. 20, § 7; Jefferson, Manual of Parliamentary Practise, 110; Pomeroy, International Law, § 116; Wheaton, Elements of International Law, part 4, ch. 4, § 2; Halleck, International Law, 848; Ware v. Hylton, 3 Dallas, 199; The Schooner Peggy, 1 Cranch, 107; Case of the Fama, 5 Chr. Robinson, 113; 5 Webster's Works, 78 ff., Defence of the Treaty of Washington; 6 Ibid., 270 ff., Diplomatic Correspondence Concerning the Treaty of Washington.

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is undoubtedly a fact; but it has never been, nor is it the policy of that government to exercise this power (1). Thus the discussion is narrowed down to the question: Can Indian country be created within the geographical limits of a commonwealth by a treaty contracted by the general government at some time previous to the admission thereof, without the enactment of a law at the time of admission, excluding such country from commonwealth jurisdiction?

Mr. Justice Matthews' opinion quoted above, sheds no light on the solution of this problem. I have been able to find arguments in the following cases only: United States v. Ward, United States v. Stahl (2), and Ex parte Hebard (3) (opinions by Mr. Justice Miller), and United States v. Berry (opinion by Judge McCrary) (4). The argument of the latter is as follows: Since there is no express repeal of any part of the treaty, that instrument and the statute should be construed together, and as far as possible, the provisions of each should be allowed to stand. An express law conferring certain special rights and privileges is held never to be repealed by implication, unless the intent to effect such repeal be clear. State v. Brannan, 3 Zabriskie, 484; State v. Minton, id., 529. Many provisions of the treaty necessarily require for their enforcement that the reservation shall remain under the sole and exclusive jurisdiction of the United States. It is the policy of the national government to retain the Indian reservations within the exclusive jurisdiction of the national governmunt, until such time as the rights of the Indians therein are extinguished by treaty; such an intention is plainly expressed in the provisions of the [Ute] treaty. The treaty by its terms was to be permanent, and the rights conferred thereby were not to be taken away without the consent of the Indians. To hold the treaty abrogated by the subsequent legislation would be to assume that Congress intended to depart in this instance altogether from the policy of treating the Indians as wards of the nation. Such a purpose

(1) See U. S. v. Ward, 1 Woolworth, 17; May Term, 1863, Opinion by Miller, J.
(2) Woolworth, 192.
(3) 4 Dillon, 380.
(4) 2 McCrary, 58.

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ought to be very clearly expressed. Such repeal can only be enacted in express terms, or by such language as imports a clear purpose on the part of Congress to effect that end. According to the Cherokee Tobacco, 11 Wall, 616, if the enabling act had extended the jurisdiction of the commonwealth to every portion of territory within its exterior boundaries, such language would have repealed by necessary implication so much of the pre-existing treaty as placed the [Ute] reservation within the jurisdiction of the United States. But no such language is employed by Congress in the enabling act. Nothing is said about the jurisdiction of the commonwealth over the territory within its boundaries. The people of the territory were to form for themselves a commonwealth government, which was to be admitted into the Union on an equal footing with the original commonwealths. It does not necessarily and invariably follow from this language that the commonwealth should exercise jurisdiction over every foot of territory within its boundaries. The language is general, and is not necessarily in conflict with an exception in a special case created by some previous law. For example : If the United States had, prior to the admission of a commonwealth, reserved for its own use for military purposes a portion of the territory embraced within the limits of the commonwealth as subsequently organized, and that the same had been set apart by law for that purpose, such a reservation would not, by virtue of the great terms of the enabling act, have passed into the exclusive jurisdiction of the commonwealth. Where such lands are taken after the formation of a commonwealth government, it has generally been deemed necessary, or at least expedient, to obtain from such government a relinquishment of jurisdiction ; but where jurisdiction over them is vested in the United States, prior to the organization of the commonwealth government, this is not necessary. Where a district of country has been by competent authority set apart as an Indian reservation, and by treaty stipulation the United States have assumed exclusive jurisdiction over it, such district remains an Indian reservation, and the federal jurisdiction continues, until it is changed by express act of Congress, or by treaty, or until the Indian title

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is extinguished, and this, notwithstanding it may be embraced within the limit of a commonwealth.

There are two points, it seems to me, that require attention in the above argument: (1) that the prior treaty extending the sole and exclusive jurisdiction of the United States over territory within the exterior geographical limits of a commonwealth as subsequently organized, is not in conflict with that provision of the enabling act or act of admission, which admits the commonwealth into the Union "on an equal footing with the original States in all respects whatever;" and (2) that territory previously reserved by the national government for military purposes does not, by virtue of the general terms of the enabling act in the absence of any special provision, pass under the exclusive jurisdiction of the commonwealth. The arguments which I shall employ against these dicta are drawn in the first case from Mr. Justice Miller's opinion in United States v. Ward, and in the second, from the opinions of the same conservative and learned justice in United States v. Stahl (1), and in Ex parte Hebard (2).

Every one of the twenty-five commonwealths admitted to Union since the adoption of the Constitution, have been admitted on an equal footing with the original commonwealths in all respects whatever (3). Congress does not possess the power to withdraw from any one of the original commonwealths, without its consent, the power to enforce its laws even in the smallest portion of its territory; and a commonwealth certainly does not give its consent to a treaty contracted before its organization as such. It cannot be said of a new commonwealth that it stands upon "an equal footing with the original States in all respects whatever," if Congress can, without the consent of the commonwealth, exclude it from the right and the power to enforce the laws which it has made, for the protection of

(1) Woolworth, 192.

(2) 4 Dillon, 380.

(3) Kentucky and Vermont were each admitted "as a new and entire member of the United States of America." The acts admitting the other twenty-three commonwealths contain the express words of the text, with the substitution of the word "State" for "commonwealth."

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the lives, persons, and property of its citizens, on every portion of its soil. This power to enforce its laws throughout its boundaries, which is unqualified and exclusive, and is to be possessed by the new commonwealths alone, and not concurrently with the federal government, is a necessary incident to her equality with the original commonwealths. It follows then, unless the clause in the act of admission is qualified by some other provision, that it operates as a repeal of the treaty stipulation that the lands of certain Indian tribes should never be brought within the bounds, nor subjected to the jurisdiction of any commonwealth.

"It is evident that the Congress which passed the act of admission apprehended the principle above expressed, and foresaw the predicament in which the United States would be placed, if it admitted the State without any provisions for such Indians, and for the lands of such Indians, as had treaties containing such a guarantee. It was foreseen that when once Kansas was admitted into the Union upon an equal footing with the original States in all respects whatever, the general government could not protect these obligations. Accordingly a proviso was annexed to the clause declaring Kansas in the Union. By this proviso, all territory was excepted out of, and was not to be included within, the State, which belonged to a tribe having such a treaty. So that . . . their reservation was not in the State. It was within the outside boundaries of the State, as described in its constitution, and yet was without the State, without its jurisdiction and without its territory" (1).

But this train of argument falls to the ground, if it does not necessarily follow from the admission of the new commonwealth on a footing of equality with the original ones, that it should exercise jurisdiction over every foot of territory within its boundaries, in the absence of a limiting provision; if, for example, a military reservation, occupied prior to the admission, does not, by virtue of the general terms of the enabling act, pass under the exclusive jurisdiction of the commonwealth. To these naked dicta of Judge McCrary, I oppose the opinions

(1) United States v. Ward.

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of Justice Miller, supported by the ablest argument. In Ex parte Hebard, referring to the Fort Leavenworth reservation, he said: "The *locus in quo* had a military fort on it, and had been reserved for military purposes for many years before Kansas was admitted into the Union as a State. But when Congress passed the law by which the State was created, it included this reservation within the boundaries of the State, and made no exception, as regards this piece of land, of the sovereign right of jurisdiction which it ceded to the State in that transaction. The effect of this, as this Court held in United States v. Stahl, Woolworth, 192, was that, while the title and right of use for all lawful purposes remained in the United States, as it did in all its other land in the State, the political jurisdiction passed to the State of Kansas.

"If matters had remained in this condition to the present time, there can be no doubt that the warrant under which the prisoner is now held would be void, because the jurisdiction of the offence would be in the State, and not in the federal government. But on the suggestion of the war department of the federal government to the authorities of the State of Kansas, the legislature passed a law, approved February 22, 1875, granting to the United States exclusive jurisdiction over the military reservation."

A treaty resembles an executory contract; it seldom operates *proprio vigore;* very often even a stipulation *non facere*, or one to prevent the performance of a certain act by others requires legislation in order that its provisions may be complied with. A guaranty that certain lands, occupied by a tribe or tribes of Indians, shall never be included within commonwealth boundaries, nor subjected to the jurisdiction thereof is a stipulation requiring such legislation. A treaty is part of the supreme law of the land, but so also is a statute; and if a statute enacted subsequent to the treaty contains provisions irreconcilable with the observance of the obligation imposed by the treaty, the court must decide that Congress has determined to abrogate the latter, as it has an undoubted right to do (1).

(1) U. S. v. McBratney, 104 U. S., 621, Opinion by Mr. Justice Gray.

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It follows that some legislation is necessary to carry out such a treaty. And as Congress cannot withdraw from a commonwealth the right to enforce its laws on every portion of its soil, without its consent, after its admission to the Union; and as such consent would undoubtedly be withheld if the object of the withdrawal were compliance with an Indian treaty, such a withdrawal must be incorporated in the act admitting the commonwealth into the Union; the approval of which by the President is, so to speak, the moment of birth of the commonwealth.

Therefore, in my opinion, Indian country exists within the exterior geographical limits of a commonwealth only by virtue of a treaty *and* of a statute, enacted at the time of admission, excluding such territory from commonwealth jurisdiction.

§ 19.—Status of the Indians in the Indian Country.

The means and method whereby Indian country is established within a commonwealth have already been discussed. When Indian country is so established, Congress has jurisdiction there under the power to regulate commerce under treaties and over the Indians as wards of the nation; and the commonwealth laws can have no effect (1). The fact that the Indians occupying such country, resort to the courts of the commonwealth "for the preservation of rights and the redress of wrongs, sometimes voluntarily, and in certain specified cases by direction of the secretary of the interior," does not argue that they submit themselves to all the laws of the commonwealth. "The conduct of Indians is not to be measured by the same standard which we apply to the conduct of other people. Kansas is not obliged to confer any rights upon them. Because a sound policy may dictate the wisdom of treating them, in some respects, as she treats her own citizens, and thereby weaning them from the ancient attachment to their own customs, they are none the less a separate people, under the protection of the general government. This policy may eventually succeed in disbanding the tribe, but until it

(1) Worcester v. Georgia, 6 Peters, 515.

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does, the Indians cannot look to Kansas for protection, nor can the general laws of the State, taxing real estate within its limits, reach their property" (1).

The fact that some of these Indians hold land in severalty and not in common, does not so change the *status* of those so holding as to subject them to the jurisdiction of the commonwealth. "If such are the effects of the treaty, they were evidently not in the contemplation of one of the parties to it, and it could never have been intended by the government to make a distinction in favor of the Indians who held in common, and against those who held in severalty." The reason is obvious: to do so would have put a premium on the failure to advance in civilization and a disability upon such an advance; which is contrary to the policy of the government. "If the Indians thus holding had less rights than their more favored brethren, who enjoy their possessions in common and in compact form, would not good faith have required that it be so stated in the treaty? The general pledge of protection substantially accorded in this treaty . . . forbids the idea that government intended to withdraw its protection from one part of the tribe and extend it to the other." So long as the tribal organization is preserved intact, and is recognized by the political department of the government as existing, so long is the land occupied by the tribe excluded from the territorial limits of the commonwealth, and the members thereof from its jurisdiction (2).

§ 20.—Limits of the Jurisdiction of Congress.

What are the limits of the jurisdiction which Congress may exercise over Indian country within commonwealth boundaries? For the old answer we must turn to the opinion of Justice McLean in United States *v.* Bailey (3). Speaking of the Indian country occupied by the Cherokees within the commonwealth of Tennessee, he says: "In such case, the power of Congress is limited to the regulation of a commercial intercourse with

(1) The Kansas Indians, 5 Wall, 737. Opinion by Davis, *J.*, Case of the Weas.
(2) Ibid. Case of the Shawnees.
(3) McLean, 234.

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such tribes of Indians that exist as a distinct community, governed by their own laws, and resting for their protection on the faith of treaties and laws of the Union. . . . If the State has no jurisdiction, or has failed to exercise it, it does not follow that the federal government has a general and unlimited jurisdiction over the territory; for its powers are delegated, and cannot be assumed to supply any defect of power on the part of the State. . . . Congress have power to regulate commerce with the Indian tribes; consequently, they may provide by law in what manner this intercourse shall be carried on, and impose penal sanctions for a violation of the law. But may they, by reason of this special power, assume a general jurisdiction, and prescribe for the punishment of all offences? If this may be done under the power to regulate commerce with the Indian tribes, why may it not be done in all other cases where a limited power is exercised by Congress to effectuate a special object. . . . And is it not equally clear, that, where a special jurisdiction has been given to Congress, a general one cannot be exercised? Is not the jurisdiction under consideration special? Does it not relate exclusively to the regulation of commerce with the Indian tribes?" And the conclusion at which the learned justice arrives, is that the jurisdiction of Congress extends only to the regulation of trade and intercourse with the Indian tribes, and that an act extending to the commission of crimes within the Indian country the penalties that attach to such crimes, if committed within any district under the sole and exclusive jurisdiction of the United States, is unconstitutional and void. But Congress may define and punish crimes committed by white men upon the person or property of an Indian, and *vice versa* (1). All other legislation for the government of the Indian country, applies to that part of it now under consideration, including that which regulates the manufacture and trade in spirituous liquors, and the internal revenue laws (2).

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(1) United States v. Martin, 14 Fed. Rep., 817; 8 Sawyer, 473, 1883.

(2) See Revised Statutes, Title xxviii., Cap. iv.; U. S. v. Tobacco Factory; 1 Dillon, 264; Cherokee Tobacco, 11 Wall, 616; the Internal Revenue Act will be found in 15 Statutes at Large, 167.

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As already said, this is the old definition of the power of Congress over Indian country within the exterior geographical limits of a commonwealth. Since Mr. Justice McLean read his opinion in 1835, Congress has transgressed the bounds which he then drew, and the limits to which it has pushed the exercise of its power have received the stamp of constitutionality from the Supreme Court in the important case of United States v. Kagama (1). The court there held that Congress may regulate all the domestic affairs of the Indian tribes and not only those that pertain to commerce and intercourse.

As to the legal relations of white persons residing within such Indian country, it seems to me that they are governed by the law of the commonwealth. But the tribunal resorted to for the enforcement of their rights must be the federal court.

The treaty stipulation and statute at the time of the admission of the commonwealth to the Union except the Indian country and its inhabitants from commonwealth jurisdiction. The courts of the commonwealth can have no jurisdiction of a suit to which a member of a tribe so excepted is a party, save by the direction of the Secretary of the Interior, or by the consent of the parties. It cannot be argued from the fact of submission in particular instances that the Indians submit themselves in all cases to the jurisdiction of the commonwealth courts (2). When these tribunals decide a controversy to which an Indian is a party under the above circumstances, they divest themselves of their quality of commonwealth courts and become for the nonce mere private arbitrators. Nor is there any weight in the decision of the Kansas Supreme Court in Rubideaux v. Vallie (3) to the effect that "every man, resident or non-resident, citizen, alien, or foreigner, if he comes within the jurisdiction of Kansas is subject to her laws." In that case the court decided two important points without deigning to give their reasons: first, that it had jurisdiction of the person of an Indian found within the territorial boundaries of the

(1) 118 U. S. 375. Opinion by Mr. Justice Miller. Decided May, 1886.

(2) Kansas Indians, 5 Wall, 737.

(3) 12 Kansas, 28.

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commonwealth, notwithstanding the treaty and statute at the time of admission excepting him therefrom; and second, that it might enforce an executory contract which the laws of the United States declared null and void. As to the first point: It will not be denied that an Indian who enters a commonwealth is subject to some jurisdiction; but every commonwealth contains two jurisdictions, one of which (the national) is exclusive as regards certain persons and certain cases. This was a case arising under both a treaty and a statute of the United States; and the assumption of jurisdiction by the commonwealth was absurd. The second point, that the commonwealth can enforce a contract which the United States incapacitates the Indian from entering into, is equally untenable. The clause of the Constitution empowering Congress to regulate commerce with the Indian tribes, vests in Congress the exclusive power to establish the capacity of tribal Indians to contract. Congress having declared that under no circumstonces can an Indian bind himself to pay money or goods (1), the fallacy of asserting on general principles (in themselves erroneous) that he can so bind himself within the boundaries of Kansas, is evident. The only instance of the existence of Indian country within commonwealth limits is found in the case of Kansas. This excludes the territory situated within the commonwealth of Colorado, declared by Judge McCrary to be Indian country in United States v. Berry (2). I have already stated that I consider this decision to be erroneous; and I prefer to include the territory under my third head.

Such is the Indian country, and the exclusion of commonwealth jurisdiction from it exists as long as the tribal organization continues and is recognized by the political department of the national government, or until the national government refuses to recognize the binding obligation of the treaty, or until the Indian tribe requests or consents to be included within the jurisdiction and geographical limits of the commonwealth (3).

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(1) 9 Statutes at Large, 204; Act of March 3, 1847, Cap. 66, § 3.

(2) 2 McCrary, 58.

(3) The Kansas Indians, Case of the Shawnees, 5 Wall, 737; 12 Stat. at Large, 126.

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C.—*Jurisdiction of the government, national and commonwealth, over territory occupied by Indian tribes — the territory being subject to the general jurisdiction of the commonwealth, but the Indian occupants being under the jurisdiction of Congress.*

§ 21.— Definition.

Few of the Indian tribes within the boundaries of the United States now live upon territory that has not been ceded to the United States; that is, most of them live upon reservations. "An Indian reservation may be defined to be a certain limited portion of our national domain, assigned by the federal government to a tribe or tribes of Indians, or some part or parts of the same, to be held by them according to the terms of the assignment. An Indian reservation and an Indian country are so far legal equivalents that the laws of the United States regulating trade and intercourse with the Indians, apply alike to both" (1). It has been held in a series of decisions including Forty-three Gallons of Cognac Brandy (2), United States v. Martin (3), United States v. Leathers (4), and United States v. Bridleman (5), that Indian reservations are necessarily Indian country. This principle is directly opposed to the definition of Indian country elaborated above. The reasoning upon which *J.J.* McCrary, Hillyer and Deady rely is summed up by the latter in the following quotation from United States v. Martin: "Unless the tracts of country included in the reservations established by the general government for the exclusive use and occupancy of the Indian tribes are 'Indian country,' there is none in the United States, and all the provisions in the Revised Statutes relating to it, and providing for the punishment of crimes committed therein, are nugatory and without effect for want of a subject to operate on.

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(1) U. S. v. Bichard & Co., 1 Ariz. T., 31.
(2) 11 Fed. Rep. 47; 14 Ibid. 589.
(3) 14 Ibid. 817.
(4) 6 Sawyer, 17.
(5) 7 Ibid. 243.

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"But so long as there is any reasonable ground to hold otherwise, this court cannot assume that Congress was fatuous enough to enact chapter 4 of title 28 of the Revised Statutes, concerning the 'government of the Indian country,' when there was no Indian country to govern.

"Ever since the phrase 'the Indian country' found its way into the federal legislation, it has been used to signify not only a place or tract of country actually occupied by Indians, but also a tract so occupied by them, and set apart or designated as exclusively for their use, under and by the authority of the United States.

"In the progress of time what are known as 'the Indian reservations,' have come to be the only country so occupied by them, and these now constitute the Indian country of the United States, and there is no other; and they are such in both law and fact. In 43 Gallons of Brandy, 11 Fed. Rep., 47, Judge McCrary held that section 1 of the Intercourse Act of 1834, *supra*, [defining the term 'Indian country'], was repealed by section 5596 of the Revised Statutes, and that in his judgment the phrase 'Indian Country,' as used in the Revised Statutes, now only includes 'that portion of the public domain which is set apart as the reservation or as reservations, for the use and occupancy of the Indians; and not the whole vast extent of the national domain to which the Indian title has not been extinguished." Upon a rehearing of this case (14 Fed. Rep., 539), the learned judge said: "An Indian reservation is a part of the public domain, set apart by proper authority for the use and occupation of a tribe of Indians. It may be set apart by an act of Congress, by treaty, or by executive order." See, also, upon this point, U. S. v. Bridleman, U. S. v. Leathers, and U. S. v. Sturgeon, *supra*.

The latter part of this train of reasoning has been combated in that of this essay which defines and discusses the term "Indian country." Since the Indian country is not confined to the comparatively narrow extent of the collective Indian reservations, but includes all the territory not organized under commonwealth governments to which the Indian title has not been extinguished, and the reservations within commonwealth

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limits excepted from the jurisdiction thereof by treaty and statute, and excludes all such reservations not so excepted, Congress exhibited no "fatuity" in devoting a chapter of title xxviii. to the "Government of the Indian Country."

§ 22.—Establishment and Boundaries of Reservations.

An Indian reservation may be established by treaty, by statute, or by executive ordinance (1). No set form of words is necessary to create a reservation; it is enough if the words used are sufficient to indicate the purpose to reserve the land (2). Now arises the query, what words are sufficient to indicate a purpose to reserve the lands? Referring to a tract of country in the northern part of Minnesota, Judge McCrary said in Forty-three Gallons of Cognac Brandy: "The fact that the tract of country in question has been sometimes referred to in treaties and official reports, as the 'Red Lake Indian Reservation,' is not sufficient to authorize the Court, in a *quasi* criminal case, to declare it to be such." The tract in question was called an Indian reservation in two successive treaties (3), and Mr. Justice Davis in construing the former treaty in the case of Forty-three Gallons of Whiskey (4) in the Supreme Court, also called the tract an Indian reservation. If the recognition of a given tract as an Indian reservation by the executive and judicial departments of the United States Government are not in the absence of Congressional action sufficient to constitute it such, it seems impossible that an Indian reservation can exist. Nevertheless, Judge McCrary says: "I do not think an Indian reservation can be established by custom or prescription. The fact that a particular tribe, or band of Indians have for a long time occupied a particular tract of country, does not constitute such tract an Indian reservation" (5). The President has the right to set apart land for Indian reservations

(1) 43 Gallons of Cognac Brandy, 14 Fed. Rep., 539; U. S. v. Leathers, 6 Sawyer, 17; U. S. v. Payne, 2 McCrary, 296.

(2) U. S. v. Payne, *supra*.

(3) 13 Stat. at Large, 668; and 13 Stat. at Large, 689.

(4) 93 U. S., 188.

(5) 43 Gallons of Cognac Brandy, *supra*.

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without special authorization; and this right has been recognized by Congress (1). The Court believes that Revised Statutes 462 and 465, granting the President full ordinance power in the execution of all laws relating to Indian affairs and in all matters arising out of Indian relations, are in themselves sufficient authorization (2).

The boundaries of a reservation are those indicated on the official map accompanying the legal instrument establishing the reservation, and not the line indicated by the surveyor's monuments or marked by order of the Indian agent (2). This is a wise and proper ruling, and it agrees with the principles of international law; for monuments are liable to be run over, either accidentally or to serve some ulterior purpose, and an Indian agent is scarcely possessed of sufficient authority to delineate the boundaries of a reservation.

A reservation of land in an Indian treaty of cession, simply secures to those in whose favor the reservation is made, a continuation of the right of occupancy in the land reserved, while the ultimate title remains in the United States as before the treaty (3). It is unnecessary to state, that where the reservation consists of a tract of unceded land, the mere fact of confining the tribe to narrower limits effected by the cession, cannot affect the ultimate title of the United States to the soil. In the case where the treaty of cession directs that the lands shall be selected and surveyed, and patents in fee simple shall be granted therefor, the Indians in whose favor the reservation is made, are, until these things have been done, tenants in common with the United States (4). The location of land scrip upon lands reserved for Indians, under the provisions of a treaty with an Indian tribe, and the issue of a patent therefor, are void (5).

The commonwealth may use its police power for the purpose of furthering the benevolent designs of the United States

(1) U. S. v. Leathers, 6 Sawyer, 17; Quoting Walcott v. Des Moines Co., 5 Wall, 681; and Grisar v. McDowell, 6 Wall, 363.

(2) U. S. v. Leathers, 6 sawyer, 17.

(3) Wheeler v. Meshinggomesia, 30 Ind., 402.

(4) Mann v. Wilson, 23 Howard, 457.

(5) U. S. v. Carpenter, 111 U. S., 347.

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Government towards the Indians (1), and it may open its Courts to them, with the view of encouraging them in their advance towards civilization (2); this will be discussed later on. But no commonwenlth can, by its constitution or legislation, withdraw the Indians within its limits from the operation of the laws of Congress, whatever right it may confer on such Indians as electors or citizens (3). If the United States recognizes the tribal organization of a tribe of Indians, the government of the commonwealth wherein they are located cannot treat them as subjects to its laws (2).

§ 23.—Termination of a Reservation.

This naturally brings us to the termination of the existence of the reservation. This may be accomplished by treaty; by the abrogation of the treaty creating the reservation by executive proclamation in time of war, or through the failure of Congress to comply with its stipulations; or by the termination of the tribal existence of the Indians on the reservation, either by the dying out of the members of the tribe, or by their merging themselves into the general mass of citizens. The first case would be a treaty of removal; in which case, to use an expression of civil law, *dominium utile* would be added to the *dominium nudum* of the United States. There is little danger of the termination of the existence of a reservation by the second or third means; for these treaties are too advantageous to the United States to be lightly abrogated. Of the fourth it may be said, that if the tribal organization of Indian bands is recognized by the political department of the national government as existing; that is to say, if the national government makes treaties with them, and has its Indian agents among them, paying annuities, and dealing otherwise with the head men of the tribe in its behalf, the fact that the primitive habits and customs of the tribe, when in a savage state, have

(1) N. Y. v. Dibble, 21 Howard, 366.
(2) Kansas Indians, 5 Wallace, 737.
(3) U. S. v. Holliday, 3 Wallace, 407; U. S. v. Kagama, 118 U. S., 375.

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been largely broken into by their intercourse with the whites —in the midst of whom by the advances of civilization, they have come to find themselves—does not authorize a commonwealth government to regard the tribal organization as gone, and the Indians as citizens of the commonwealth wherein they are located, and subject to its laws (1).

An old and highly esteemed decision is that of Mr. Justice McLean in United States v. Cisna (2). It prescribes still another mode of terminating the existence of a reservation within commonwealth limits, viz.: if the Indians, although still maintaining the tribal relation, have made considerable advances in the arts of civilization, and occupy a territory of very limited extent (twelve miles square), surrounded by a white population, which necessarily has daily intercourse with the Indians, and it thus becomes impracticable to enforce the laws of the United States regulating intercourse with the Indian tribes, the Federal jurisdiction must cease, and that of the commonwealth must be absolute and exclusive over the reservation and its inhabitants.

The facts upon which this opinion is based are as follows: The Wyandotts occupy a very limited tract; they are surrounded by a dense white population which has daily intercourse with them; they have made rapid advances in civilization; the treaties with them have not been abrogated; a government agent resides among them, through whom the government holds its official intercourse with the tribe; for years past, the laws which regulate intercourse have not been enforced; they are unsuited to the condition of the Wyandotts; it is immaterial whether they have been expressly repealed or rendered inoperative by the force of circumstances: inasmuch as the Federal government by encouraging the tribe to advance in civilization has mainly contributed to produce this state of things, it may be presumed that it intended to abrogate the law. Congress has no power to regulate the domestic affairs of Indian tribes, but only to regulate commerce with them.

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(1) Kansas Indians, 5 Wallace, 737.

(2) 1 McLean; 254. Circuit Court, Dist. of Ohio, July Term, 1835.

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This opinion has never been overruled in express terms; but the principles upon which it rests have been branded as incorrect by the Supreme Court. I desire only to refer to the last quotation from the opinion in The Kansas Indians, which enumerates the circumstances mentioned above and then emphatically states that they do not warrant a commonwealth to regard the Indians as its citizens and subject to its laws. And Mr. Justice Miller, in United States v. Kagama, lays down the rule that Congress has the power to regulate the domestic affairs of Indian tribes; that this power cannot be deduced from the authorization to regulate commerce without straining the construction of that clause to a very marked degree; that the Indian tribes are the wards of the nation, dependent on the Federal government for protection; that this condition is largely due to the course which that government has pursued toward them, and the treaties in which protection has been promised; that hence arises the duty of protection, and with it the power; and that this is recognized by the three departments of the government. Finally, the Indians owe no allegiance to the commonwealth, and receive from it no protection.

If, in view of the extinction of the reservation, the Indians sell their lands and agree to remove within a given time, and fail to do so, the commonwealth cannot extend its laws over them while they remained on those lands (1). A taxation of the lands before the efflux of the term is premature, even though a sale for the non-payment of taxes might not take place until after the time when, if they fulfilled their agreement, the Indians would have left the land; and though any sale would, by law, affect in no manner the right of the Indians to occupy the land (2). Nor can the commonwealth enforce a judgment of its court for the plaintiff in a suit to recover the land, if the Indians fail to remove within the stipulated time (3). The duty and power to enforce this removal resides in the United States alone (4).

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(1) Worcester v. Georgia, 6 Peters, 515.
(2) Kansas Indians, 5 Wall, 537; New York Indians, 5 Wall, 761.
(3) Fellows v. Blacksmith, 19 How., 366.
(4) Cases cited, *supra*.

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§ 24.—Jurisdiction of Congress over a Reservation.—The Liquor Traffic.

The case of United States v. Kagama, already so frequently cited, simplifies the relations of tribes upon reservations within commonwealth limits very much. The old theory was that the United States Government might regulate trade and intercourse only, that the tribe itself should regulate family relations, and that everything else was subject to commonwealth law. This has been overthrown. The national government may now regulate all the relations of the Indians. The commonwealth now has jurisdiction only over the legal relations of whites *inter sese*. This opinion overrules a long list of decisions which once were in the highest honor in this department of the law. But it is founded upon fact; it is merely a recognition of the fact that the result of the development of this nation during the past twenty-five years has been to vest the national government with many powers formerly wielded by the commonwealths. It is just as worthy of recognition as was sixty years ago the fact that the political and economic development of the country and the spread of population, had rendered the old theory of the relation of the Indian tribes to the sovereignty and government of the United States a fiction.

Congress has legislated upon the public relations of the Indians. One of the most interesting branches of this legislation is the liquor traffic, and its discussion has been postponed to this place. The general regulations which prohibit the gift or sale of liquor to an Indian anywhere, who is under the charge of an agent, have already been mentioned. By treaty and by legislative enactment the prohibition upon the introduction of liquors into the Indian country, and the means of preventing such introduction and of punishing any violation of this law, have been extended to the Indian reservations generally. But this is not all. Under its constitutional power to regulate commerce with the Indian tribes, Congress may not only prohibit the unlicensed introduction and sale of spirituous liquors into the Indian country and into that class of

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reservations which we are now discussing, but it may extend such prohibition to the adjacent territory, should such territory be used for the purpose of carrying on the liquor traffic with them. And it is competent for the United States, in the exercise of the treaty-making power, to stipulate in a treaty with an Indian tribe, that within the territory thereby ceded and subjected to the jurisdiction of the commonwealth, the laws of the United States then or thereafter enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect, until otherwise ordered by Congress or the President of the United States (1).

The court held that such a stipulation does not derogate from the equality of the commonwealth, over whose territory this prohibition is extended, with the original commonwealths. The prohibition rests on grounds which, so far from making a distinction between the commonwealths, apply to them all alike. The fact that the ceded territory is within the limits of any particular commonwealth is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without commonwealth lines. Based as it is exclusively on the federal authority over the *subject matter*, there is no disturbance of the principle of commonwealth authority. Moreover, the power to make treaties with the Indian tribes is co-extensive with the power to make treaties with foreign nations. In the exercise of the latter, the United States may bind itself to contravene a commonwealth statute, as, for instance, in the matter of the ability of aliens to take real property by descent or devise. In such a case, the courts would disregard the statute and give the alien the full protection conferred by the provisions of the treaty. It follows that the Federal government may, in the exercise of its power to treat with the Indians, make the provision in question, coming, as it fairly does, within the clause relating to the regulation of commerce.

I must confess that the train of reasoning by which the court arrives at this result is not perfectly clear to me. I cannot see

(1) U. S. v. Forty-three Gallons of Whiskey, 93 U. S., 188.

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that the power to regulate commerce with the Indian tribes includes the power to prohibit the introduction of liquors into territory adjacent to a reservation and under commonwealth jurisdiction, unless the latter power be regarded as a necessary ancillary power to the former; that is, unless the exercise of the latter be necessary to the exercise of the former. That it is so, I am not prepared to say. It seems that the purpose aimed at by the prohibition could be attained by the rigid enforcement of the prohibition upon the introduction of liquors to a reservation, and Revised Statutes, section 2139, which forbids under penalty the sale, exchange, gift, barter or disposal of any spirituous liquor to any Indian under the charge of an agent of the government (1). But the decision in question was rendered according to the unanimous opinion of the court, and it has been affirmed several times in the twelve years that have elapsed since then.

It follows that the power which Congress may exercise over commerce of every other description is equally great. It may cut off intercourse of every kind with the Indians, if it deems that advisable, for Congress has passed non-intercourse laws and embargoes with reference to foreign commerce, and its power over commerce with the Indians is co-extensive with that over foreign commerce (2). The principal commercial regulations will be found in Revised Statutes, sections 2103, 2105, 2106, 2116, 2128, 2129, 2130, 2131, 2133, 2134, 2136, 2139, 2140 and 2141.

§ 25.— Taxation by the United States.

The United States may tax the property of Indians; and it has done so by extending the internal revenue laws imposing taxes on distilled and fermented liquors, tobacco, snuff and cigars, everywhere within the exterior boundaries of the United States. This extension abrogates provisions of prior treaties to

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(1) Acts of 9 July, 1832, c. 174, s. 4, vol. 4, p. 564; 15 March, 1864, c. 33, v. 13, p. 29; 27 February, 1877, c. 69, v. 19, p. 244.

(2) U. S. v. Bailey, 1 McLean, 234; U. S. v. Clana, Ibid., 254. U. S. v. Holiday, 3 Wall, 407.

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the contrary (1). It so happens that the five civilized nations inhabiting the Indian Territory are the only ones affected by this statute, but it affirms the principle laid down above.

§ 26.— Taxation by the Commonwealths.

Whether the commonwealth may tax the property of tribal Indians inhabiting reservations within its boundaries, is not so easily answered. Lowry v. Weaver (2) holds that "except by compact, or the voluntary legislative action of the State, lands within its limits cannot be withdrawn from its ordinary action," including taxation. If the word compact can be fairly construed to mean a treaty between the United States and an Indian tribe, this decision is in accord with later ones. But the context hardly seems to warrant this interpretation. The case of the New York Indians (3) decided the point that a treaty between an Indian tribe and the federal government, in which the latter gives the former the assurance that "their lands shall remain theirs until they choose to sell them," debars the commonwealth from taxing such lands either for ordinary town or county purposes or for the special purpose of surveying them and opening roads through them. And further, that a statute authorizing the sale of such lands for non-payment of taxes is void, even though it contain a proviso that no such sale shall affect the right of occupancy of the Indians. A treaty stipulation that certain land shall not be liable to levy, sale, execution, or forfeiture prevents a levy and sale for taxes as well as a levy and sale under judicial proceedings (4). The ordinance of 1787, which provides that "the utmost good faith shall always be observed toward the Indians; their lands and property shall never be taken from them without their consent," if embodied in a commonwealth constitution, precludes the commonwealth from taxing their lands or selling or forfeiting them for non-payment

(1) Internal Revenue Act of July 20, 1868, sec. 107; 15 Stat. at Large, 167; 13. Opinions Attorneys' General, 546; Case of Ed. Dwight, Cherokee Tobacco, 11 Wall, 616; Aff'g 1 Dill, 264.

(2) 4 McLean, 82.

(3) 5 Wall, 761.

(4) Kansas Indians, 5 Wall, 737.

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of taxes (1). The facts that these lands are held in fee simple, and that the ordinary restriction upon the alienation of Indian lands does not apply to them, and that they are held under a patent from the United States government does not subject them to taxation while their possessors maintain the tribal relation (2). The granting of a patent and the severance of the tribal bond by the patentee, whether by failing to obey the laws and customs of his tribe or by accepting the patent in lieu of all his rights in the property of the tribe, subject such lands to commonwealth taxation (3). I do not know that this ground has ever been taken by the United States Courts, but it seems to me that lands held by Indians in common or under allotment cannot be touched by the commonwealth because the property of the United States is exempt from taxation, probably even without the special clause which it is the custom to annex to acts of admission (4). As to lands held in fee simple under a patent, the restriction on their alienation without the consent of the President or the secretary of the interior, which applies to most of them, renders a sale for taxes void (5). The Supreme Court, moreover, in following Chief Justice Marshall's *dictum* that an Indian treaty must never be construed to the disadvantage of the Indians has made treaty provisions the most general in their language, work an exemption of lands held by tribal Indians from commonwealth taxation (6). The tendency of the court is shown by Justice Miller in United States v. Kagama, where he says: "The Indians owe no allegiance to the States, and receive from them no protection." In fact, as far back as 1832, the court decided that the law of Georgia of 12th December, 1829, extending the laws of that commonwealth, including its tax laws, over the Cherokee Indians, was invalid (7).

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(1) Meshinggomesia v. State, 36 Ind., 310.

(2) Waupemanqua v. Aldrich, 28 Fed. Rep., 489; See Commissioners v. Pennock, 18 Kas., 579; Pennock v. Commissioners, 103 U. S., 44.

(3) Quinney v. Stockbridge, 33 Wisc., 505; Hilyers v. Quinney, 51 Wisc., 62.

(4) Cooley on Taxation, 87; Blue Jacket v. The Commissioners of Johnson County, 3 Kas., 299.

(5) Pennock v. Commissioners, *supra*.

(6) The Kansas Indians, Case of the Weas, Case of the Miamis, 5 Wall, 757, 759.

(7) Worcester v. Georgia, 6 Peters, 515; See Van Brocklin v. U., S. 117 U. S. 151.

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I know of no instance where a commonwealth has attempted to tax the personal property of tribal Indians; but I think that if such an attempt should be made, the spirit that animates the decision in United States v. Kagama—that the Indians are the wards of the nation, and that the commonwealths cannot be trusted to touch them in any way—would defeat it.

RELATION OF THE INDIANS TO THE JUDICIARY.

§ 27.—Status of a Tribe.

An Indian tribe is not a foreign nation in the meaning of the Constitution; hence the Federal courts cannot take cognizance of a suit brought by such a tribe, unless they have jurisdiction by reason of the subject matter, independently of the character of the parties (1). May a tribe institute a suit for trespass on the lands occupied by it? It seems very probable; the Supreme Court decided in 1856, that any one who takes forcible possession of a farm within a reservation, in the occupancy of an Indian, is liable to an action of trespass (2). A decision in a commonwealth court (Strong v. Waterman (3), is directly to the contrary; but it was based on a decision by the courts of the same commonwealth that was overruled (4). It would seem that the Federal courts, developing the course of reasoning in Fellows v. Blacksmith, would take cognizance of an action of trespass on tribal property instituted by a tribe.

§ 28.—Status of Individual Indians.

We must distinguish between Indians residing off the tribal reservation and those residing on it. A United States Circuit Court has decided that "when the members of a tribe of

(1) Cherokee Nation v. Georgia, 5 Peters, 1.

(2) Fellows v. Blacksmith, 19 Howard, 366; affirmed by New York Indians, 5 Wall, 761.

(3) 11 Paige, 607.

(4) Goodell v. Jackson, 20 Johns., 188; overruled by Jackson v. Goodell, Ibid., 698.

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Indians scatter themselves among the citizens of the United States, and live among the people of the United States, they are merged in the mass of our people, owing complete allegiance to the government of the United States, and of the State where they may reside, and equally with the citizens of the United States, and of the several States, subject to the jurisdiction of the courts thereof (1). This decision is based upon the findings of United States and commonwealth courts in several cases (2). But a circuit court has decided that an Indian living off the reservation is not an alien in the meaning of the Constitution and of the Judiciary Act (3), basing its decision on The Cherokee Nation v. Georgia, where the court was of the opinion that an Indian tribe is not a foreign State; and hence the circuit court decided that members of the tribe could not be aliens. The whole field of the jurisdiction of the commonwealth courts over Indians is menaced by United States v. Kagama. This decision asserted that the Indians owe no allegiance to the commonwealth, and receive no protection from it, and that the United States may regulate all the relations of the Indians. United States v. Holliday (4), and United States v. Forty-three Gallons of Whiskey (5), decided that the United States may regulate the sale of spirituous liquors to an Indian wherever he may be, even within commonwealth limits, where the exercise of the jurisdiction of the commonwealth is undisputed. It follows that whatever jurisdiction the commonwealth courts exercise over Indians off the reservation (and they do exercise such jurisdiction), is exercised by suffrance of Congress, and until that body chooses to withdraw these Indians from those courts by regulating their relations itself. For the present, at any rate, Indians off the reservation may hold and transfer property (6), may sue on

(1) *Ex parte* Kenyon, 5 Dillon, 385.

(2) Dred Scott v. Sanford, 19 Howard, 404; U. S. v. Sacoodacot, 1 Dill., 271; *Ex parte* Reynolds, 5 Dill., 394; Rubideaux v. Vallie, 12 Kansas, 28; Taylor v. Drew, 21 Ark., 485; Parent v. Walmsley, 20 Ind., 82; Lee v. Glover, 8 Cow. (N. Y.), 189.

(3) Karrahoo v. Adams, 1 Dill., 344.

( ) 3 Wall, 409.

(5) 93 U. S., 188.

(6) Parent v. Walmsley, 20 Ind., 82.

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contracts (1), may sue for wrongs committed against them (2), and possess "the unquestionable right to be sued" (3) for torts, and to be prosecuted by the public prosecutor for offenses, misdemeanors, or crimes (4).

§ 29.—Status of Individual Indians (continued).

The Indians upon a reservation are subject to a threefold jurisdiction. If Congress chooses, it may regulate all their affairs (5); this would give the Federal courts cognizance of all cases to which an Indian is a party. At present, however, the Federal courts have no jurisdiction of common-law cases, except in so far as the common law has been made statutory law by enactment of Congress. The jurisdiction of the commonwealth, where not restricted by existing treaties with the Indian tribes, or by the act admitting such commonwealth into the United States, extends over the Indians, except in so far as it is restricted by the authority of Congress to regulate commerce with the Indian tribes, and precluded by the legislation of Congress over the relations of the Indians (6). From this jurisdiction a Circuit Court of the United States has excepted the property of the Indians (7). This distinction is a very just and salutary one, I think. As the law now stands, the United States and the commonwealth (between them), exercise the police power over the Indians on the reservation; but the commonwealth laws regulating property, which are devised to govern a civilized society, not a primitive one, and which are not adapted to the requirements of the latter, do not extend to the property of the Indians. It is right that the commonwealth law should fill the gaps in the criminal law enacted by Congress for the Indians; otherwise the reservation

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(1) Rogers v. Duval, 23 Ark., 77.

(2) Wiley v. Keokuk, 6 Kansas, 94; Wiley v. Manatowah, Ibid., 111.

(3) Rubideaux v. Vallie, 12 Kansas, 28.

(4) U. S. v. Sacoo-da-cot, 1 Dillon, 271.

(5) U. S. v. Kagama, 118 U. S., 375.

(6) State v. Doxtater, 47 Wisc., 298; State v. Harris, Ibid.

(7) U. S. v. Payne, 4 Dillon, 389; Mackey v. Coxe, 18 Howard, 100: Gray v. Coffman, 3 Dill., 394; Mungosah v. Steinbrook, 3 Dill.; Dole v. Irish, 2 Barb., 639.

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might become a sink of iniquity whence all the surrounding territory would be polluted. Under this law the court of Wisconsin punished an Indian who committed adultery with another Indian upon a reservation within that commonwealth (1).

§ 30.—Tribal Custom, Usage and Law.

But neither the Federal nor the commonwealth law are exclusive in so far as they govern the domestic relations of the Indians. The *lacunæ* are filled by the tribal custom, usage and law. Thus the whole law of property, in so far as it is untouched by Federal legislation is tribal (2). Where Congress has undertaken to legislate with reference to crime, its jurisdiction is exclusive (3). But Congress is careful to state that its general criminal legislation shall not work the abrogation of treaty provisions that secure to the Indian tribes respectively the exclusive jurisdiction of such offenses (4). The domestic relations, in so far as they are not regulated by Federal or commonwealth legislation, are governed by tribal custom, usage and law (5). The extension of the jurisdiction of the commonwealth over the territory occupied by an Indian tribe does not abrogate their laws and customs, so far as the members of the tribe are concerned. This can be effected only by positive enactment (6). Marriage customs, however barbarous, will be regarded in the absence of a statute to the contrary, as constituting a valid marriage; and a divorce, which by the law of the tribe, may be effected by mere abandonment of the wife at the pleasure of the husband, will be given the same effect by the commonwealth courts as if a dissolution of the marriage had been directed by a lawful decree (7).

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(1) State v. Doxtater, 47 Wisc., 298; State v. Harris, Ibid.

(2) U. S. v. Payne, 4 Dillon, 389; Mackey v. Coxe, 18 Howard, 100; Gray v. Coffman, 3 Dill., 394; Mungosah v. Steinbrook, 3 Dill.; Dole v. Irish, 2 Barb., 639.

(3) U. S. v. Ragsdale, Hemp., 489.

(4) Rev. Stat., § 2146.

(5) Gray v. Coffman, 3 Dill., 394; Wall v. Williams, 8 Ala., 48; Wall v. Williams, 11 Ala., 826; Dole v. Irish, 2 Barb., 639; Boyer v. Dively, 58 Mo., 510.

(6) Wall v. Williams, 8 Ala., 48.

(7) Boyer v. Dively, 58 Missouri, 510.

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§ 31.—Is an Indian a Person?

We now come to the interesting inquiry whether an Indian is a person. Following Mr. Canfield (1), I distinguish between a person, *particeps rationis* (2), who partakes necessarily in the "jus gentium quo gentes humanæ utuntur" (3); a person, that is a human being capable of being invested with legal rights and liable to perform legal duties (4); and a person in the meaning of the Constitution of the United States. It need not be said that an Indian is a person in the first two acceptations of the word. As regards the third, we may say that he is a person in the meaning of article 1, section 9, paragraph 1, which prohibits Congress from forbidding the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit." United States v. Crook (5) decided that "an Indian is a person within the meaning of the *habeas corpus* act, and as such is entitled to sue out a writ of *habeas corpus* in the Federal courts when it is shown that the petitioner is deprived of liberty under color of authority of the United States, or is in custody of an officer in violation of the Constitution, or a law of the United States, or in violation of a treaty made in pursuance thereof." It follows that article 1, section 9, paragraph 2 of the Constitution, which provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless where in Cases of Rebellion or Invasion the public Safety may require it," applies equally to Indians and white persons. If an Indian is secured the privilege of the writ of *habeas corpus*, it would appear that he is also entitled to the privileges of the eighth amendment: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." It seems that these restrictions were imposed on the judiciary in the name of humanity

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(1) 15 Am. Law Review, 28.

(2) Cicero De Legibus, 1, § 1.

(3) Digest I. 1., 1. 4.

(4) Amos: Roman Civil Law, 105. See Phillimore: Private Law among the Romans, 26; Puchta: Institutionen. §§ 22, 28, 30, 207, 210; Demageat: Cours de Droit Romain I., 144.

(5) 5 Dillon, 453.

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at large, and not only to protect Americans against the Federal judiciary. The United States government has legislated extensively with regard to crime committed by Indians; are they not entitled in prosecutions under these laws to the benefit of the safeguard thrown about civil liberty by art. 3, sec. 1 of the Constitution, that is, trial before a judge holding office during good behavior—and by the fifth, sixth, and seventh amendment? And if they are entitled to these privileges, is it not illogical to exclude them from the other privileges of persons? I think that these questions must be answered in the affirmative.

§ 32.—Half-breeds, Indians by Adoption, and Indians by Marriage.

The only topic that remains open for discussion is the status of half-breeds, of Indians by adoption and of whites who intermarry with Indian women. As regards half-breeds, a Federal court looking for some rule whereby to regulate their status, hastily adopted the maxim of the civil law: *partus sequitur ventrem* (1). But the rule *partus sequitur patrem* has been substituted for it. The first rule applied only to the increase of animals and to the offspring of slave-mothers; whereas the latter has always governed the status of the offspring of freemen. And the Indians are freemen (2). As to Indians by adoption, "no citizen of the United States can obtain exemption from the laws of the United States which regulate intercourse with the Indians, by entering their territory within our limits and becoming one of them by adoption" (3), or by a residence among them (4). This rule has been extended to white men generally (5), and has been amplified by the addition of the following: "He may, however, by such adoption,

(1) U. S. v. Sanders, Hemp., 483.

(2) *Ex parte* Reynolds, 5 Dillon, 394. See I. Bouvier, Institutes, 193, see 502; 31 Barb., 486; 2 Bouvier, Law Dictionary, 147; Shanks v. Dupont, 3 Peters, 242.

(3) 2 Op. Att. Gen., 402. Trade with the Indians, J. M. Berrien, 1830.

(4) Ibid., 693, Jurisdiction of the Choctaw courts, B. F. Butler, 1834.

(5) 7 Op. Att. Gen., 174, U. S. v. Rogers, 4 Howard, 567; U. S. v. Ragsdale Hempstead, 497.

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become entitled to certain privileges in the tribe, and also make himself amenable to their laws and usages" (1). His offspring are legally members of the white race (2). He is entitled to the privileges of membership in the tribe into which he has been adopted, but cannot divest himself of his allegiance to the United States, and if he cannot be regarded as an Indian when he contravenes the trade and intercourse laws, it follows that the sale of liquor to him is not an offense, nor the purchase of his cooking or hunting implements. The principle of law that underlies these seemingly anomalous features is, it seems to me, that a white man who is adopted into an Indian tribe, is regarded as a white man in the meaning of all laws or ordinances that regulate the relations of Indians as participants in a lower civilization than ours, and thus entitled to certain exemptions and immunities. An Indian by adoption has enjoyed the benefit of our civilization, and hence is not entitled to these exemptions and immunities. In all other respects, he is regarded as an Indian. An Indian by marriage alone, and without adoption, occupies precisely the same position; except that perhaps he is not entitled to claim the guarantees against the commonwealth contained in a treaty with his tribe. This rests upon the decision of a commonwealth court alone, never having been affirmed by a court of the United States.

(1) U. S. v. Ragsdale, *supra*.
(2) *Ex parte* Reynolds, *supra*.

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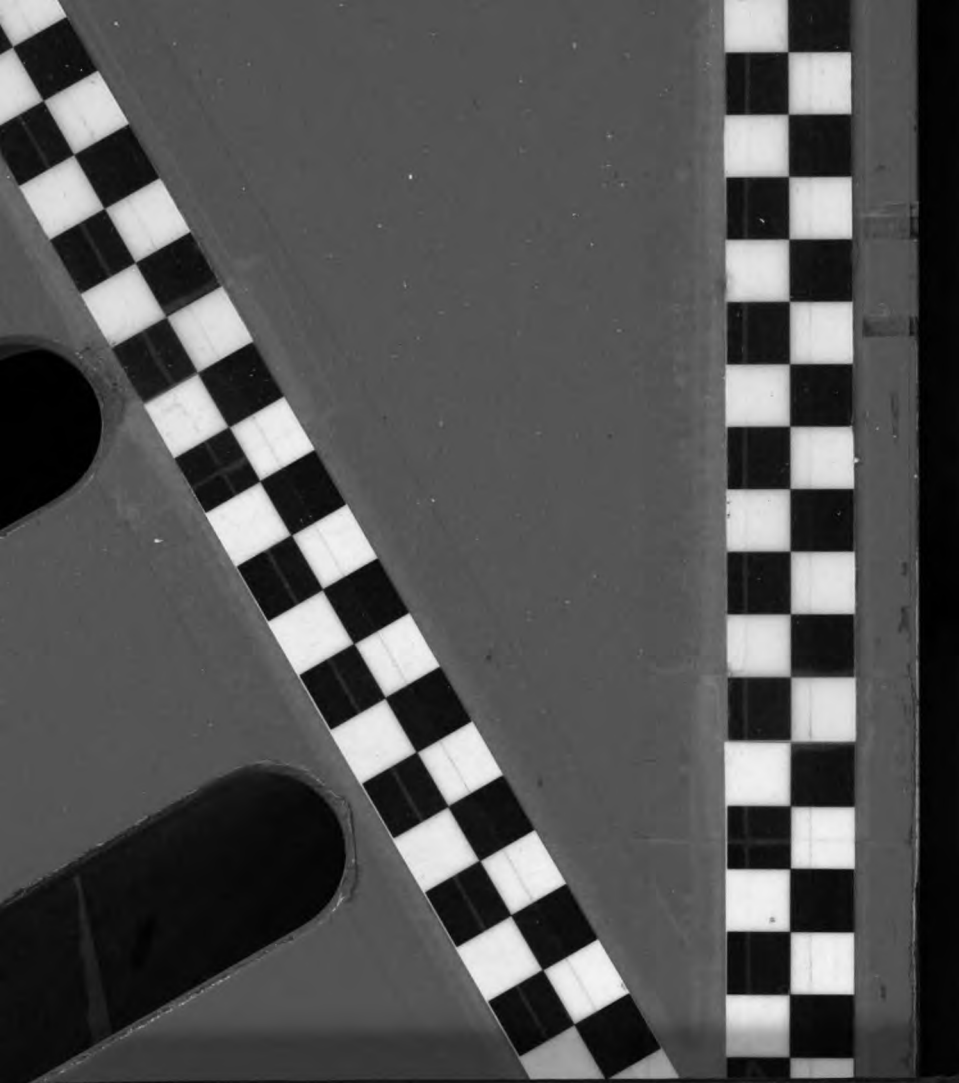

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